11700–11886 ITEMS COMMON TO ALL CASES

11700–11714 JURISDICTION

11700 Jurisdictional Standards

The Board's jurisdictional standards existing on August 1, 1959, have been incorporated into the statute as defining the extent to which the Board might in its discretion decline to exercise its legal jurisdiction. Pursuant to Section 14(c)(1), these standards may be modified provided that the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing on August 1, 1959.

11702 Advisory Opinions

Under certain circumstances the Board will make a preliminary determination as to whether it would assert jurisdiction over the parties to a particular controversy. (a) Whenever a party to a proceeding before any agency or court of any State or territory is in doubt whether the Board would assert jurisdiction on the basis of its current jurisdictional standards, the party may file a petition with the Board for an advisory opinion on whether it would assert jurisdiction on the basis of its current standards. (b) Whenever an agency or court of any State or territory is in doubt whether the Board would assert jurisdiction over the parties in a proceeding pending before such agency or court, the agency or court may file a petition with the Board for an advisory opinion on whether the Board would decline to assert jurisdiction over the parties before the agency or the court (1) on the basis of its current standards, or (2) because the employing enterprise is not within the jurisdiction of the National Labor Relations Act. A copy of the petition should be *served* on the Regional Director—the Region should not act as transmission agent of the original petition to the Board. (See Secs. 102.98–102.104 of the Board's Rules and Regulations and Secs. 101.39–101.41 of Statements of Procedure.)

11702.1 Intervention in Advisory Opinion Proceedings

Whenever a petition for an advisory opinion is served, if the Regional Director is in possession of jurisdictional facts, secured during the investigation of a prior or current C or R case and he/she believes such facts would assist the Board in rendering its advisory opinion, the Regional Director should move to intervene in the advisory opinion proceeding.

When appropriate the Regional Director should:

a. Move to intervene in the advisory opinion proceeding pursuant to Section 102.102 of the Rules and Regulations.

b. Submit to the Board with his/her motion the jurisdictional facts contained in the investigatory file, after having conducted any necessary additional investigation as to

jurisdiction. If the case is closed, however, no further investigation should be conducted unless the Board so requests.

c. In accord with Section 102.113(b) of the Rules, serve copies of the motion to intervene and jurisdictional facts on the state court or agency and the parties to the state proceedings.

d. Advise the parties so served that pursuant to Section 102.101 of the Rules, they have 14 days after service thereof within which to make a response.

e. File eight copies of the motion to intervene, together with the jurisdictional information.

11704 Declaratory Orders:

When both an unfair labor practice charge and a representation case relating to the same employer are contemporaneously on file in a Regional Office, and there is doubt as to whether the Board would assert jurisdiction over the employer involved, the General Counsel may file a petition with the Board for a declaratory order disposing of the jurisdictional issue in the cases.

If the Regional Director is of the opinion that a declaratory order should be sought, he should prepare a petition containing the allegations required by Section 102.106 of the Board's Rules and Regulations. The eight copies of the petition, plus sufficient additional copies for service on all parties, should be submitted to the Division of Operations Management with a transmittal memorandum setting forth the Region's recommendations. An affidavit of service, original and two copies, containing the names and addresses of all parties involved in the unfair labor practice and representation cases should also be prepared in the Region and submitted with the petition.

If the petition is deemed appropriate, the General Counsel will sign it, file it with the Executive Secretary of the Board, serve a copy of the petition on each of the parties involved, complete the affidavit of service, and notify the Region by means of a conformed copy of the affidavit of service.

(For proceedings following the filing of the petition see Secs. 102.108–102.110 of the Board's Rules and Regulations, and Sec. 101.43 of the Statements of Procedure.)

11706 Investigation

Among the earliest determinations to be made are whether the employer is an "employer" under the Act and whether, applying current Board standards, the alleged unfair labor practices or question concerning representation "affect commerce." Charges or petitions deficient in either of these respects should be dismissed absent withdrawal.

11708 Obtaining Commerce Information from Employer

Normally, commerce information is furnished by the employer involved. In a CA case, in an R case, or in a UD case an appropriate questionnaire is sent the employer with the initial letter; in all other cases, a similar questionnaire should be sent at an early date by the assigned Board agent. Questionnaires should be tailored to fit the circumstances of the case. It is important to note that the use of such questionnaires in some cases will be only the beginning point of the jurisdictional investigation; where further investigation is necessary, of course, it must be undertaken. This is particularly true in CA cases where the returned questionnaire indicates that the employer falls just a little short of the jurisdictional standards and in cases against labor organizations, or some R cases, where the Board's jurisdiction may be contested by the respondent or an intervenor, respectively.

11708.1 Commerce Questionnaire

FORM NLRB-5081 (8-83)

NATIONAL LABOR RELATIONS BOARD

QUESTIONNAIRE ON COMMERCE INFORMATION

FORM EXEMPT UNDER 44 U.S.C. 3512

Please read carefully. Answer all applicable items and return to the Regional Office. If additional space is required, use plain bond paper and identify item number.

CASE NAME	CASE NUMBER

1. TYPE OF BUSINESS
[ ] CORPORATION [ ] PARTNERSHIP [ ] SOLE PROPRIETORSHIP

2. CLASSIFICATION WHICH DESCRIBES YOUR BUSINESS

[ ] WHOLESALING	[ ] NEWSPAPER	[ ] OFFICE OF INDUSTRIAL BUILDING	[ ] RETAIL
[ ] HOSPITAL	[ ] HOTEL - MOTEL	[ ] MANUFACTURING/PROCESSING	[ ] SERVICE ORGANIZATION
[ ] TRUCKING	[ ] PUBLIC UTILITY	[ ] BROADCASTING STATION	[ ] NURSING HOME
[ ] TRANSIT SYSTEM	[ ] BUILDING AND CONSTRUCTION	[ ] OTHER *(Describe)*	

3. EXACT LEGAL TITLE OF FIRM

4. IF A CORPORATION

A. INCORPORATED IN STATE OF:	B. NAME(s) AND ADDRESS(es) OF PARENT, SUBSIDIARY, OR RELATED CORPORATION, IF ANY, AND DESCRIBE RELATIONSHIP

5. IF A PARTNERSHIP
FULL NAME AND COMPLETE ADDRESS OF ALL PARTNERS.

6. IF A PROPRIETORSHIP
FULL NAME AND COMPLETE ADDRESS OF PROPRIETOR.

7. BRIEFLY DESCRIBE THE NATURE OF YOUR BUSINESS *(General products handled or manfactured, or nature of services performed).*

8. PRINCIPAL PLACE OF BUSINESS LOCATED AT:	BRANCH(es) LOCATED AT:

9. NUMBER OF PERSONNEL PRESENTLY EMPLOYED BY YOUR FIRM

A. TOTAL	B. AT THE ADDRESS INVOLVED IN THIS PROCEEDING.

10. DURING THE PAST [ ] CALENDAR, [ ] FISCAL YEAR *(If Fiscal Year indicate dates)* OR [ ] LAST 12 MONTHS *(Check appropriate box):*

A. DID GROSS REVENUE FROM SALES OR PERFORMANCE OF SERVICES DIRECTLY TO CUSTOMERS OUTSIDE THE STATE EXCEED $50,000 [ ] YES [ ] NO IF LESS THAN $50,000 INDICATE AMOUNT	$
B. DID GROSS AMOUNT OF PURCHASES OF MATERIALS OR SERVICES DIRECTLY FROM OUTSIDE THE STATE EXCEED $50,000 [ ] YES [ ] NO IF LESS THAN $50,000 INDICATE AMOUNT	$
C. DID GROSS REVENUE FROM YOUR SALES OR PERFORMANCE OF SERVICES EQUAL OR EXCEED $50,000 TO FIRMS WHICH DIRECTLY MADE SALES TO CUSTOMERS OUTSIDE THE STATE AND/OR TO CUSTOMERS WHICH MADE PURCHASES FROM DIRECTLY OUTSIDE THE STATE [ ] YES [ ] NO IF LESS THAN $50,000 INDICATE AMOUNT	$
D. IF THE ANSWER TO 10(c) IS NO, DID GROSS REVENUE FROM SALES OR PERFORMANCE OF SERVICES EQUAL OR EXCEED $50,000 TO PUBLIC UTILITIES, TRANSIT SYSTEMS, NEWSPAPERS, HEALTH CARE INSTITUTIONS, BROADCASTING STATIONS, COMMERCIAL BUILDINGS, EDUCATIONAL INSTITUTIONS AND/OR RETAIL CONCERNS [ ] YES [ ] NO IF LESS THAN $50,000 INDICATE AMOUNT	$
E. DID GROSS AMOUNT OF YOUR PURCHASES EQUAL OR EXCEED $50,000 FROM FIRMS WHICH IN TURN, PURCHASED THOSE GOODS DIRECTLY FROM OUTSIDE THE STATE [ ] YES [ ] NO IF LESS THAN $50,000 INDICATE AMOUNT	$
F. GROSS REVENUE FROM ALL SALES OR PERFORMANCE OF SERVICES *(Check largest amount which firm equaled or exceeded):* [ ] $100,000 [ ] $200,000 [ ] $250,000 [ ] $500,000 [ ] $1,000,000 IF LESS THAN $100,000 INDICATE AMOUNT	$

11. ARE YOU A MEMBER OF, OR PARTICIPATE IN, AN ASSOCIATION OR OTHER EMPLOYER GROUP THAT ENGAGES IN COLLECTIVE BARGAINING?
[ ] YES [ ] NO *(If Yes, give Name and Address of association or group).*

12. DID FIRM PERFORM NATIONAL DEFENSE WORK DURING THE PERIOD INDICATED IN 10 ABOVE? [ ] YES [ ] NO *(If Yes, amount of dollar volume and name(s) and address(es) for whom work was performed).*	$

13. PROVIDE NAME & TITLE OF YOUR REPRESENTATIVE BEST QUALIFIED TO GIVE FURTHER INFORMATION CONCERNING THE OPERATIONS OF YOUR BUSINESS

NAME	TITLE	TELEPHONE NUMBER

SIGNATURE OR AUTHORIZED REPRESENTATIVE COMPLETING THIS QUESTIONNAIRE

NAME AND TITLE *(Type or Print)*	SIGNATURE	DATE

☆ U.S. Government Printing Office: 1985—482-869/39363

11708.2 Sworn Affidavits; When Required

Where an employer furnishes commerce information that falls just short of the jurisdictional standards used by the Board and where the employer contests the Board's jurisdiction on the ground that its business does not meet the Board's standards, sworn affidavits should be procured from the employer with respect to the information being furnished. The Regional Director may request an affidavit in any case, should he believe that the circumstances justify one.

In the obtaining of an affidavit pursuant to the foregoing policy, the employer should be advised that it is subject to the criminal penalties of the United States Code applicable to any one giving false information to the United States Government, and a statement to this effect, such as that now used on petitions and charges,

WILLFULLY FALSE STATEMENTS HEREIN CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

could appropriately appear at the bottom of the affidavit.

If, on request made pursuant to the foregoing policy, the employer refuses to submit an affidavit, the case should be set down for hearing, all other factors being appropriate.

11708.3 Subpoena Served on Employer (see also secs. 11770–11806)

All reasonable and practical avenues are to be explored before resort to investigative subpoena. Should an employer prove uncooperative in this respect, other sources (sec. 11710) should be utilized unless an undue expenditure of time will be involved. One need not, for example, circularize 30 or 40 customers of an employer as an alternative to issuance of a subpoena on the employer.

If the utilization of reasonable and practical means fails to develop sufficient evidence to dispose of the question of jurisdiction in C case, a subpoena—normally, duces tecum—should be served on the employer. It should be returnable *before* issuance of complaint unless it is otherwise clear (through some form of inadmissible evidence, such as widespread repute, etc.) that the Board does have jurisdiction. In the latter case, the subpoena should be returnable at the C case hearing.

If, in representation cases, utilization of reasonable and practical means fails to develop sufficient evidence to dispose of the question of jurisdiction, production of the relevant material should be demanded in writing (subpoena returnable at the hearing may be used for this purpose). The Board agent responsible for establishing jurisdictional facts should be prepared to establish facts concerning statutory jurisdiction and otherwise make a record appropriate for a jurisdictional determination under the *Tropicana Products*, 122 NLRB 121 (1958), standard, in the event of noncooperation or noncompliance with the subpoena. If, for any reason, the *Tropicana* standard is inapplicable, uncertain, or inadvisable, a subpoena duces tecum should be served, and, if necessary, enforced. In appropriate circumstances, a subpoena returnable before issuance of the notice of hearing may be used.

11710 Other Sources for Obtaining Commerce Information

Other sources may be utilized as a supplement to, a check on, or substitutes for information supplied directly by the employer. For example:

a. Prior cases

b. Employees, such as receiving/shipping department employees

c. Suppliers or customers of employer

d. Railroads, trucking lines

e. tate and Federal agencies

f. Business listings, Moody, Standard and Poor, trade journals.

11710.1 Contacts with Other Agencies:

Contacts with Washington offices of other agencies should be made through the Division of Operations Management. Out-of-Washington contacts may be made directly or with the assistance of other Regional Offices.

11712 Action on Basis of Commerce Investigation

Do not proceed (or dismiss) on a bare admission (or denial) that jurisdiction exists. All determinations in this respect must be based on *facts*.

11712.1 Jurisdictional Standards Not Met

Where it is clear that a given case does not meet the Board's jurisdictional standards, the case should be dismissed on the ground that it will not effectuate the policies of the Act to assert jurisdiction.

11712.2 Jurisdiction Doubtful

Wherever a case involves a doubtful question of jurisdiction, submit it for advice to the Division of Advice (see sec. 11751.1), whether or not any party objects to the assertion of jurisdiction.

11712.3 Gross Volume Sole Test

Where gross volume of business is the sole test for asserting jurisdiction, elicit commerce data on inflow, outflow, franchise, etc., sufficient to establish de minimis statutory jurisdiction.

11712.4 Subpoena Not Complied with

Where an investigative subpoena relating to commerce has not been complied with, it should be enforced (secs. 11770 and 11790) unless *Tropicana* is relied on or the need for the subpoenaed material is otherwise obviated (sec. 11708.3).

11714 Proof in Formal Proceedings

See sections 10390–10402 for C cases; sections 11216–11230, particularly 11228, for R cases. Also see section 11712.4. In absence of stipulation thereto, commerce facts should be proved on the record.

11720 Transfer, Consolidation, and Severance

11720 Generally

Rules and Regulations, Sections 102.33 and 102.72, deal with transfer, consolidation, and severance of charges and petitions, respectively. The bases for action in this respect involve necessity with respect to effectuation of purposes of the Act, costs, and time, e.g., cases may be transferred where economy is thus achieved; cases may be consolidated where (a) the issues and parties are substantially the same and (b) no one is prejudiced thereby.

11720.1 Transfers

Transfers are handled in the following manner: The Regions involved in the transfer will confer by mail, teletype, or telephone about the proposed action and the reasons therefor. The Region that is transferring the case will then request the Division of Operations Management by teletype (see Clerical Procedures, sec. 12420) for an order transferring the case. The request will contain the case name, petitioner or charging party, the present case number, and number to be assigned on transfer; a brief statement of the reasons for transfer; and an indication of whether the transferee Region concurs in the proposed action. A copy of the teletype will be sent to the transferee Region. On receipt of the General Counsel's order of transfer, the transferring Region will send the file to the transferee Region after notifying all parties to the case of the transfer and that future correspondence in the case should be directed to that office.

A transfer may be effected at the time of filing, if the necessity for transfer is apparent at that time; otherwise, the transfer should take place as soon as the necessity therefor becomes apparent.

11720.2 Consolidation

A consolidation normally does not take place while the cases involved are in the nonformal investigative stages. It normally occurs when notices of hearing are about to issue or when, one of the cases already having been noticed for hearing, the other(s) are about to be noticed.

A Regional Director on his/her own motion may, without clearance, consolidate cases pending in his Region in the following situations:

a. R cases involving the same employer or the same employer-association

b. CA cases where the respondent is the same in each case

c. CB cases where the respondent is the same and where the fact situations are related (e.g., an illegal contract or an associationwide strike)

d. A CA and a CB case where both cases arose from the same state of facts (e.g., a discharge, a strike situation, or bargaining negotiations claimed to have been in bad faith on both sides)

e. An R case in which the Board or the Regional Director has directed a hearing on objections with a C case, where the two cases involve issues in common.

In all other situations where consolidation is desired, an oral or written request for authority, including a brief statement of facts, should be submitted to the Division of Operations Management.

The order of consolidation is issued by the Regional Director where the cases consolidated are all pending in his/her Region and may be combined with a notice of hearing.

11720.3 Severance

Prior to hearing the Regional Director, on his/her own motion, may sever cases that he/she had previously consolidated on his/her own authority. In other situations clearance should be obtained from the Division of Operations Management.

11720.4 Motions

Motions by the parties to consolidate or sever should be filed with the chief administrative law judge if prior to hearing or with the administrative law judge if during hearing.

11730–11734 Concurrent R and C Cases

To the extent relevant, the principles of these Sections should also be applied to situations involving UD petitions.

These Sections apply to preelection situations. They generally do not deal with those postelection situations in which challenges and/or objections and related unfair labor practice charges are being processed. Such situations are discussed in Secs. 11407 and 11420.1.

For special procedures where there are concurrent 8(b)(7) cases, see Secs. 10240–10248.

11730–11731 BLOCKING UNFAIR LABOR PRACTICE CHARGES; EXCEPTIONS

11730 Blocking Charge Policy—Generally

The Agency has a general policy of holding in abeyance the processing of a petition where a concurrent unfair labor practice charge is filed by a party to the petition and the charge alleges conduct that, if proven, would interfere with employee free choice in an election, were one to be conducted. However, there are significant exceptions to the

general policy of having a charge "block" a petition. Accordingly, the filing of a charge does not automatically cause a petition to be held in abeyance.

The exceptions to the blocking charge policy are set forth in detail in Sec. 11731. When the Regional Director is giving consideration to these exceptions while implementing the blocking charge policy, it should be recognized that the policy is not intended to be misused by a party as a tactic to delay the resolution of a question concerning representation raised by a petition. Rather, the blocking charge policy is premised solely on the Agency's intention to protect the free choice of employees in the election process.

11730.1 Types of Blocking Charges

Blocking charges fall into two broad categories. The first, called Type I charges, encompasses charges which allege conduct that only interferes with employee free choice. The second, called Type II charges, encompasses charges which allege conduct that not only interferes with employee free choice but also is inherently inconsistent with the petition itself. After investigation of the latter charges and a determination as to their merit, such charges may also cause a petition to be dismissed.

11730.2 Type I Charges: Charges That Allege Conduct That Only Interferes With Employee Free Choice (Request to Proceed May be Honored)

When the charging party in a pending unfair labor practice case is also a party to a petition, and the charge alleges conduct that, if proven, would interfere with employee free choice in an election, were one to be conducted, and no exception (Sec. 11731) is applicable, the charge should be investigated and either dismissed or remedied before the petition is processed. Unless Type II conduct is involved, a request to proceed by the charging party (Sec. 11731.1) may be honored in these cases. *Columbia Pictures Corp*., 81 NLRB 1313, 1314 (1949); *Carson Pirie Scott & Co*., 69 NLRB 935, 938–939 (1946); *United States Coal & Coke Co*., 3 NLRB 398, 399 (1937); see also *Bros*., 146 NLRB 383, 384 (1964).

11730.3 Type II Charges: Charges That Affect the Petition or Showing of Interest, That Condition or Preclude a Question Concerning Representation, or That Taint an Incumbent Union's Subsequent Loss of Majority Support (Request to Proceed May Not be Honored)

Some unfair labor practice charges allege conduct which, if proven, would not only have a tendency to interfere with the free choice of employees in an election, but also would be inherently inconsistent with the petition itself. Regardless of whether such charges are filed by a party to the petition or by a nonparty, and regardless of whether a request to proceed (Sec. 11731.1) is filed, such charges block a related petition during the investigation of the charges, because a determination of the merit of the charges may also result in dismissal of the petition. Inherently inconsistent charges include, but are not limited to, the situations described below in Secs. 11730.3(a) through (c).

11730.3(a) Charges That Affect the Petition or Showing of Interest

These are Section 8(a)(1) and (2) or 8(b)(1)(A) charges that challenge the circumstances surrounding the petition or the showing of interest submitted in support of the petition. If meritorious, such a charge may invalidate the petition or some or all of the showing of interest. As a consequence, the petition may be dismissed. Sec. 11733.2(a)(1).

Examples:

(1) A finding of merit to an 8(a)(1) charge that alleges the employer's representatives were directly or indirectly involved in the initiation of a RD or UD petition.

(2) A finding of merit to an 8(a)(1) charge that alleges the employer's representatives were directly or indirectly involved in the support of a RD or UD petition, if the showing is reduced below 30 percent after the tainted showing is subtracted.

(3) A finding of merit to an 8(a)(2) charge that alleges employer representatives assisted in the showing of interest obtained by a labor organization, if the showing is reduced below 30 percent after the tainted showing is subtracted.

(4) A finding of merit to an 8(b)(1)(A) charge that alleges that a labor organization's showing of interest was obtained through threats or force, if the showing is reduced below 30 percent after the coerced showing is subtracted.

NOTE: See Sec. 11028.2 for the limited circumstances under which a petition may be dismissed because of conduct relating to the petition or the showing of interest, where such conduct is not the subject of an unfair labor practice charge.

11730.3(b) Charges That Condition or Preclude a Question Concerning Representation

These are Section 8(a)(2) and (5), 8(b)(3), or other charges which allege violations that involve recognition issues. These charges include allegations of Section 8(a)(5) or 8(b)(3) failure to recognize or bargain, or Section 8(a)(1) and/or (3) violations requiring a remedial bargaining order, or Section 8(a)(2) unlawful recognition. A determination of merit in such a charge may impose conditions upon or preclude the existence of the question concerning representation sought to be raised by the petition (e.g., *Big Three Industries*, 201 NLRB 197 (1973)). Sec. 11733.2(a)(2).

Examples:

(1) An 8(a)(5) or 8(b)(3) charge, which seeks to establish, to continue or to reestablish a bargaining relationship and for which the remedy is an affirmative bargaining order, may require dismissal of a related petition upon a finding of merit to the charge.

(2) An 8(a)(1) and/or (3) charge, in which a remedial bargaining order is being sought, seeks to establish a bargaining relationship, and would require dismissal of a related petition upon a finding of merit to the charge. *Gissel Packing Co.*, 395 US 575 (1969).

(3) An 8(a)(2) charge that seeks to disestablish a bargaining relationship imposes a condition upon the question concerning representation that the petition seeks to raise and must be resolved prior to processing the petition. In this situation, a determination of no merit, permitting the challenged bargaining relationship to continue, may, because of contract or recognition bar principles, require dismissal of a related petition which seeks to establish a new bargaining relationship. A determination of merit to the 8(a)(2) charge may cause the petition to continue to be blocked, until resolution of the charge by the Board, since the bargaining relationship must be disestablished before the petition can be processed. **EXCEPTION:** Sec. 11731.1(c)(1).

NOTE: Not all merit determinations in charges alleging 8(a)(2) and (5) or 8(b)(3) violations would require dismissal of the petition. If the remedy for the 8(a)(2) and (5) or 8(b)(3) conduct would not have an effect on the bargaining relationship and thus does not condition or preclude the existence of the question concerning representation sought to be raised by the petition, and if other Type II charges are not involved (Secs. 11730.3(a) and (c)), the petition would not be subject to dismissal.

Examples:

(1) Remedying a meritorious 8(a)(2) allegation of limited assistance by a low-level supervisor does not necessarily require disestablishment of a bargaining relationship.

(2) Remedying meritorious allegations of 8(a)(5) or 8(b)(3) unilateral change or failure to furnish information does not necessarily require an affirmative bargaining order.

Accordingly, these kinds of charges should be viewed as Type I charges that allege only interference (Sec. 11730.1(a)), notwithstanding their allegations of 8(a)(2) and (5) or 8(b)(3) conduct.

FURTHER NOTE: An 8(a)(2) and (5) or 8(b)(3) charge involving recognition conduct that postdates the filing of the petition does not warrant dismissal of the petition, since the petition was already on file when the later allegedly unlawful conduct occurred. Similarly, such conduct that postdates the obtaining of the showing of interest and did not affect the filing of the petition does not warrant dismissal of the petition. Hence, these kinds of charges should be viewed as Type I charges that allege only interference (Sec. 11730.1(a)). *Empresas Inabon, Inc.*, 309 NLRB 291 (1992) (also *Union de la Construccion v. NLRB*, 10 F.3d 14, 16 (1st Cir. 1993)); *Celebrity, Inc.*, 284 NLRB 688 (1987).

11730.3(c) Charges That Taint an Incumbent Union's Subsequent Loss of Majority Support

These charges can be of any kind, other than a charge that affects the circumstances surrounding the petition or the showing of interest or a charge that involves a general refusal to recognize and bargain with the union. These charges raise the issue of a causal relationship between the violations alleged and the subsequent expression of employee disaffection with an incumbent union. A finding of merit to such a charge and of a causal connection between the violations alleged and the employee

disaffection would warrant dismissal of a petition that was filed based upon that disaffection. Sec. 11733.2(a)(3).

Example:

An 8(a)(1) statement to a group of represented employees that the employer intends to operate in the future as a nonunion employer may require the dismissal of a petition that follows, if upon a finding of merit to the charge a causal relationship is established between the statement and the subsequent expression of employee disaffection with the incumbent union which is used to support the petition. *Williams Enterprises,* 312 NLRB 937, 939 (1993).

11730.4 Decision Whether to Hold Petition in Abeyance

Regardless of whether the charge is already pending at the time of the filing of the petition or is filed after investigation of the petition has already begun, the Regional Director should decide whether the general policy of holding the petition in abeyance should be applied (Sec. 11730) or if one of the exceptions in Sec. 11731 applies. As part of implementing the blocking charge policy, the Regional Director should also reassess, throughout the steps of processing the charge and the petition, whether the charge blocks the petition.

Where dismissal of the petition is warranted or the petitioner requests its withdrawal, such action should be taken.

11730.5 AC and UC Cases

Although **t**he blocking charge policy applies to AC and UC petitions, in most situations the charge and the petition raise significant common issues which may better be resolved by processing the UC or AC petition. Secs. 11490.3 and 11731.3.

11730.6 Period of Pendency of Charge

A charge is pending at all stages up to and including an administrative decision to dismiss or a withdrawal, on the one hand; or, on the other, up to and including a court judgment with which there has not been full compliance. However, also see Sec. 11732 regarding the impact of charges that are to be or have been dismissed.

11730.7 Informing Parties

The Board agent handling the matter should inform the parties of any determinations made with regard to concurrent charges and petitions and the reasons therefor. If any party requests the reasons in writing, the Regional Director should promptly provide them. If the determination is to hold the petition in abeyance, the letter should also inform the parties of their right to obtain review by the Board of this determination under Sec. 102.71 of the Rules and Regulations.

If as a result of the determination a scheduled election is postponed, see Secs. 11302.1(b) and 11314.8 regarding notification to the parties.

11730.8 Notification to Board

If a blocking charge is filed at a time when a petition is pending before the Board in Washington, the Executive Secretary should be notified of the filing, as well as of any request to proceed that may be received. All subsequent relevant developments or dispositions of the unfair labor practice charge should also be reported to the Executive Secretary.

11731 Exceptions to Blocking Charge Policy

Exceptions to the Agency's general policy to block petitions are described below in Sections 11731.1 through 11731.5 as Exceptions 1 through 5. As noted in Sec. 11730.4, their applicability may be invoked or reconsidered at any time during the pendency of the petition.

NOTE: Exceptions 2 through 5 apply to Type II as well as Type I charges. The fact that a Type II charge may ultimately involve dismissal of the petition should be an element in the Regional Director's consideration as to whether an exception applies.

11731.1 Exception 1: Request to Proceed

11731.1(a) Receipt of Request to Proceed (Type I Charge)

A petition may be processed notwithstanding the pendency of a Type I charge (Sec. 11730.2) in a related C case, subject to the limitations set forth below, if the party filing the charge requests that the petition proceed. Form NLRB-4551 may be used for this purpose. On receipt of a request to proceed and if otherwise appropriate, the Regional Director may proceed with action on the petition. If the matter is before the Board for any reason, the Executive Secretary should be so advised.

11731.1(b) Rescission of Request to Proceed

Should a party seek to rescind a request to proceed and once again suspend action on the petition, the reasons for the change should be ascertained. The Regional Director should rule on the request to rescind, applying the same considerations outlined in Sec. 11730 regarding the Agency's blocking charge policy. The charging party's prior willingness to attempt to continue with processing the petition should not, in and of itself, be viewed as a reason not to honor the charging party's subsequent attempt to rescind its request to proceed. It may contend, for example, that with the passage of time the unfair labor practices have had a tendency to interfere with the free choice of employees in an election. On the other hand, if the Regional Director determines, upon consideration of all the relevant factors, not to grant approval of the rescission, processing of the petition should continue.

The parties should be appropriately informed. Sec. 11730.7.

11731.1(c) Where Type II Charges are Involved

A request to proceed should not be approved in the face of a Type II charge. Sec. 11730.3. Where such allegations are involved, they should be disposed of before a

concurrent petition is processed, unless other exceptions apply (Secs. 11731.2 through 11731.5.).

11731.1(c)(1) Section 8(a)(2) *Carlson* Waiver

In cases in which the Board has entered an order requiring the respondent employer to withdraw and withhold recognition from the assisted union unless and until it has been certified, the Regional Director may honor a waiver whereby the petitioner affirmatively indicates a willingness to withdraw an 8(a)(2) assistance charge in the event the allegedly assisted union is certified. *Carlson Furniture Industries*, 157 NLRB 851 (1966). In the event all parties reach an agreement that accomplishes the same purpose as a Board order disestablishing a bargaining relationship, thus removing recognition or contract bar as an issue from the processing of the petition, the Regional Director may honor a waiver from the petitioner modeled on *Carlson Furniture.*

11731.1(c)(2) Withdrawal and Attempted Reinstatement of Charge

A party which requests withdrawal of a refusal-to-bargain charge or of a domination of or assistance to union charge, in order to unblock a R case (in other words, which attempts to accomplish by withdrawal what it cannot accomplish by a request to proceed), should be advised that reinstatement of the charge might not be permitted after an election. *Fernandes Supermarkets*, 203 NLRB 568 (1973).

11731.2 Exception 2: Free Choice Possible Notwithstanding Charge

There may be situations where, in the absence of a request to proceed (Secs. 11731.1(a) and 11731.1(c)(1)), the Regional Director is of the opinion that the employees could, under the circumstances, exercise their free choice in an election and that the R case should proceed notwithstanding the existence of a concurrent Type I or Type II unfair labor practice case and the absence of a request to proceed or a waiver.

Factors: The following are among the factors to be considered under this Section.

(a) the character, scope and timing of the conduct alleged in the charge, and the conduct's tendency to impair the employees' free choice

(b) the size of the work force relative to the number of employees involved in the events or affected by the conduct alleged in the charge

(c) whether the employees were bystanders to or the actual targets of the conduct alleged in the charge

(d) the entitlement and interest of the employees in an expeditious expression of their preference regarding representation

(e) the relationship of the charging parties to labor organizations involved in the representation case

(f) the showing of interest, if any, presented in the R case by the charging party

(g) the timing of the charge.

Also see Sec. 11731.5 for the considerations that apply when a charge is filed before a scheduled election.

11731.3 Exception 3: Petition and Charge Raise Significant Common Issues; UC and AC Petitions

There are situations where the Type I or Type II alleged unfair labor practices are so related, at least in part, to the unresolved question concerning representation sought to be raised by the petition that the processing of the petition will resolve significant common issues. *Panda Terminals*, 161 NLRB 1215, 1223–1224 (1966); *Krist Gradis*, 121 NLRB 601, 615–616 (1958). Thus, it may be appropriate to conduct a hearing and issue a decision to resolve an issue, such as supervisory status, that is relevant to both the petition and the unfair labor practice case. Sec. 11228. Where appropriate, the conditions of Exception 2 (Sec. 11731.2) should also be taken into account, especially with respect to proceeding to an election.

UC and AC Petitions: When a UC or AC petition and an 8(a)(2) or 8(a)(5) charge raise the same issue, the UC or AC petition may be the more effective way of resolving the issue. Sec. 11490.3. Ordinarily, the UC or AC case should be processed while the 8(a)(2) or (5) charge is held in abeyance, unless the potential for excessively lengthy or duplicative proceedings warrants a determination to process the issue through the unfair labor practice case.

11731.4 Exception 4: Scheduled Hearing

In situations where a R case hearing has already been scheduled when a Type I or Type II unfair labor practice charge is filed and time does not permit determination of possible merit of the charge, the Regional Director may proceed with the hearing in the R case. A separate determination should then be made by the Regional Director pursuant to Exceptions 2 and 3 above (Secs. 11731.2 and 11731.3) with regard to issuing a decision and/or conducting an election.

11731.5 Exception 5: Scheduled Election

When an election has already been scheduled and thereafter a Type I or Type II unfair labor practice charge is filed too late to permit adequate investigation before the scheduled election, the Regional Director may, in his/her discretion:

(a) postpone the election pending disposition of the charge; or

(b) hold the election as scheduled and impound the ballots until after disposition of the charge; or

(c) conduct the election, issue the tally of ballots and, in the absence of objections, issue a certification; and then proceed to investigate the charge.

Factors: The following are among the factors to be considered under this Exception:

(1) the extent to which substantial evidence in support of the allegations is submitted by the charging party with its charge

(2) the passage of time between the alleged conduct and the filing date of the charge

(3) the seriousness of the allegations and the evidence submitted with the charge as to its dissemination.

Relevant factors recited in Exception 2 (Sec. 11730.2) may also be considered.

If as a result of the determination a scheduled election is postponed, see Secs. 11302.1(b) and 11314.8 regarding notification to the parties.

11732–11733 FINDING AS TO MERIT OF UNFAIR LABOR PRACTICE CHARGE

11732 Charge Found Not to Have Merit

If, upon completion of investigation of the charge, it is determined that the charge lacks merit and is to be dismissed, absent withdrawal, the Regional Director should proceed with the processing of the petition.

Where the situation involves a Type I charge (Sec. 11730.2), the Regional Director should proceed with the petition as if there were no concurrent charge, even though the dismissal of the charge is either pending or on appeal, unless, in his/her discretion, he/she concludes that further processing of the petition should await the results of the appeal.

Where the situation involves a Type II charge (Sec. 11730.3) and the dismissed charge is either pending or on appeal, the Regional Director may await the results of an appeal before processing or dismissing the petition, as appropriate, or he/she may proceed immediately.

If an appeal of the dismissal of the charge is filed with the Office of Appeals, that office should be immediately notified of the pending concurrent petition and its current status. If subsequent to this notification an election is scheduled in the petition, separate notification of such should be sent to the Office of Appeals. If an election is to be conducted before the Office of Appeals has ruled on the appeal of a Type II charge, the ballots ordinarily should be impounded pending a ruling from the Office of Appeals.

11733 Charge Found to Have Merit

If, upon completion of investigation of the charge, it is determined that the charge has merit and that a complaint should issue, absent settlement, the Regional Director should determine whether further processing of the petition should be blocked by the charge or the petition should be dismissed. The parties should be informed accordingly. Sec. 11730.7. For the purposes of that determination, the Regional Director shall accept the allegations to be set forth in the complaint as true.

11733.1 Blocking of Petition Warranted

If the Regional Director determines that the petition should be blocked by a Type I charge, because the impact of the meritorious unfair labor practices would have a tendency to interfere with employee free choice in an election, were one to be conducted, he/she should hold the petition in abeyance until disposition of the charge, whereupon the processing of the petition may be resumed. Absent unusual circumstances, Exceptions 1 through 5 to the foregoing, set forth in Secs. 11731.1 through 11731.5, are equally applicable after a merit determination has been made in the charge.

11733.2 Dismissal of Petition Warranted

11733.2(a) Types of Violations Found

11733.2(a)(1) Violations That Affect the Petition or Showing of Interest

If the Regional Director finds merit to an 8(a)(1) and (2) or 8(b)(1)(A) charge that challenges the circumstances surrounding a petition or the showing of interest submitted in support of a petition (Sec. 11730.3(a)) and the alleged conduct, if proven, directly affects a petition or its showing of interest to an extent that the showing is insufficient, then the petition should be dismissed, subject to reinstatement by the petitioner after final disposition of the C case. Sec. 11733.2(b).

NOTE: Sec. 11028.2 discusses the limited circumstances under which a petition may be dismissed because of conduct relating to the petition or the showing of interest, where such conduct is not the subject of an unfair labor practice charge.

11733.2(a)(2) Violations That Condition or Preclude a Question Concerning Representation

If the Regional Director determines that the meritorious allegations involve violations of Section 8(a)(1), (3) and (5) or 8(b)(3) and the nature of the alleged violations, if proven, would condition or preclude the existence of a question concerning representation, the Regional Director should dismiss the related R case, subject to a request for reinstatement by the petitioner after final disposition of the charge. Sec. 11733.2(b). If meritorious unfair labor practice allegations result in a settlement agreement, including one which contains a nonadmissions clause or one which involves a non-Board settlement resulting in a withdrawal of the charge, pursuant to which settlement agreement the employer is to recognize and bargain with the union, then any RD or other petition that challenges a union's majority status that was filed subsequent to the onset of the alleged unlawful conduct should be dismissed, without provision for reinstatement. *Liberty Fabrics, Inc*., 327 NLRB No. 13 (1998); *BOC Group, Inc.*, 323 NLRB 1100 (1997); *Douglas-Randall, Inc.*, 320 NLRB 431 (1995); *Freedom WNLE-TV*, 295 NLRB 634 (1989). A petition filed while a settlement agreement is still in the compliance stage of case processing is also subject to dismissal. Sec. 11730.6.

11733.2(a)(3) Violations That Taint an Incumbent Union's Subsequent Loss of Majority Support

This Section applies to an unfair labor practice charge of any kind other than one that directly attacks the circumstances surrounding the petition or the showing of interest or one that involves a general refusal to recognize and bargain with the union. If the Regional Director finds merit to an unfair labor practice charge of another kind than described in the preceding sentence, and there is specific proof of a causal relationship between the unfair labor practice allegations and ensuing events indicating that the alleged unfair labor practices tainted a subsequent expression of employee disaffection with an incumbent union, then the Regional Director should dismiss a petition that was filed based upon that disaffection. The petition is subject to a request for reinstatement

by the petitioner after final disposition of the C case. Sec. 11733.2(b). *Williams Enterprises*, 312 NLRB 937, 939 (1993).

11733.2(b) Dismissal Letter

The dismissal letter (Sec. 11102) should set forth the basis for the action, including the reasons that the unfair labor practice findings would affect further processing of the petition. The specific connection between the conduct alleged as unfair labor practices and the petition should be clearly articulated. If more than one basis for dismissal is arguably present, all such bases ordinarily should be stated. For example, conduct, such as direct dealing, which the investigation revealed was causally related to the employee disaffection upon which the petition was based (Sec. 11730.3(c)), may also be conduct the remedy for which—bargaining—precludes a question concerning representation (Sec. 11730.3(b)); the petition should be dismissed for both reasons. The parties should be informed of the right to obtain review by filing a request for such with the Board. Sec. 102.71, Rules and Regulations. Where there is provision for reinstatement of the dismissed petition on application of the petitioner after final disposition of the unfair labor practice case, the dismissal letter should so advise the petitioner. A petition is subject to reinstatement only if the allegations in the unfair labor practice case, which caused the petition to be dismissed, are ultimately found to be without merit. An application for reinstatement under any other circumstances should be denied.

In order to assure notification to the petitioner of the disposition of the unfair labor practice proceeding, the petitioner should be made a party in interest in the unfair labor practice proceeding, with an interest limited solely to receipt of a copy of the order or other document that operates to finally dispose of the proceeding and the dismissal letter should so advise.

11734 RESUMPTION OF PROCESSING OF PETITION

11734 Resumption of Processing of Petition Upon Disposition of Charge

Processing of a petition held in abeyance during the pendency of an unfair labor practice charge may be resumed upon the disposition of the charge. Where the charged party or respondent in the unfair labor practice proceeding has taken all action required by a settlement agreement, administrative law judge's decision, Board order or court judgment, except that the full period for posting any required notice has not passed, certain preelection action with respect to the R case may be taken, whether or not the charging party requests that the R case proceed. Thus:

(a) a hearing may be held

(b) an election agreement may be approved

(c) an order dismissing petition or a decision and direction of election may be issued.

As noted, these preelection actions may be taken in the absence of a request to proceed.

ELECTION: In the event the charging party wishes to proceed to an election during the posting period, a written waiver must be obtained from the charging party, stating that the unremedied unfair labor practices referred to in the posted notice may not constitute grounds on which the Board may set aside the election.

Absent such a waiver, an election should not be held until the posting period has expired.

EXCEPTION: When the remedy requires that recognition of an unlawfully assisted union be withdrawn and withheld unless and until that union has been certified by the Board, neither a RC petition filed by that union nor a RM petition should be entertained until after the expiration of the posting period. The showing of interest submitted in support of a petition filed by that union must be dated after expiration of the posting period.

11740 PRIORITY OF CASES

11740 Priority of Cases

All cases are handled promptly but preference is given to those cases that have priority under the statute.

11740.1 Statutory Priority Cases

(See Sec. 10(l) and (m) of the Act.) The following types of cases have statutory priority:

a. 8(b)(4)(A), (B), and (C) cases

b. 8(b)(4)(D) cases involving 10(l) injunctive relief

c. 8(b)(7) cases, including petitions under Section 8(b)(7)(C) and Section 9(c), and charges affecting the disposition of 8(b)(7) cases or petitions thereunder

d. 8(e) cases

e. 8(a)(3)

f. 8(b)(2)

In determining which of several statutory priority cases should be given priority within the particular class or category, consideration shall be given to the particular facts of each case, including the date of filing, the nature of the alleged violation, its impact on the parties or the public, the type of relief indicated, and any other factors that would effectuate the policies of the Act in relation to priority in casehandling.

In this connection, where the need for injunctive relief is indicated in a particular statutory priority case, the preliminary investigation of such case, including the further processing to injunctive relief, shall normally take precedence over other matters in the office since time is of the essence where such relief is indicated. While all statutory

priority cases must be handled expeditiously, any determination as to the manner of implementing this objective must in part be predicated on recognition of the time-factor problems relating to each. For instance, in an "expedited" election situation under Section 8(b)(7)(C), an interval of several days would normally be involved between the time of the direction of the election and the holding of the same during which the priority nature of the case would be of little practical significance; similar considerations are involved when evidence in an 8(a)(3) or 8(b)(2) case is unavailable for a short period of time, etc.

11740.2 Order of Priority Based on Agency Policy

Those cases not referred to in section 11740.1 as having statutory priority should be handled in accordance with the following order of priority which is based on agency policy considerations:

a. Any other C case involving 10(j) injunctive relief (the priority status of cases involving 10(j) injunctive relief is determined when the need for such injunctive relief is first indicated)

b. Other 8(b)(4)(D) cases

c. Other charges that are delaying the disposition of an R case (e.g., "blocking" C case)

d. Cases in which a work stoppage or lockout is in effect or is imminent and there is a direct relationship between the stoppage or lockout and the charge or petition

e. R cases involving a schism issue

f. Other R or UD cases

g. Other C cases

No action should be suspended in *any* case except for action on a case of higher priority. Thus, the possibility of settlement should not be allowed to impede the orderly processing of a case.

Where in an 8(b)(4)(D) case 10(l) injunctive relief is indicated, it is treated as a statutory priority case. Where such injunctive relief is not indicated, the priority of an 8(b)(4)(D) case is no longer considered statutory in nature; such cases are accordingly given priority in the manner described above within the Agency policy category.

Where petitions under Sections 8(b)(7) and 9(c) of the Act are "blocked" by a C case, the latter should be investigated promptly and given priority over all other cases except as listed in section 11740.1, since the disposition of the "blocking" charge affects the further processing of the petition and the statutory priority 8(b)(7) case. Similarly, an 8(a)(2) charge filed in the context of an 8(b)(7) case would require a prior determination since no 10(l) restraining order in the 8(b)(7) case could be sought if it is determined that the 8(a)(2) case has merit. (See Sec. 10(l) of the Act.)

11750–11756 SUBMISSION FOR ADVICE, CLEARANCE, OR AUTHORIZATION

It is not intended that sections 11750–11756 take the place of instructions in other sections of the manual concerning advice, clearance, or authorization, all of which should be followed even though not specifically set forth.

11750 In General

The decision as to whether a case falls in category of cases covered by this section must be made by, and is the responsibility of, the Regional Director. Although disagreement on the merits between the Regional Director and regional attorney does not automatically render a case one to be submitted, the existence of such disagreement is an important factor to be considered. Where the Regional Director and the regional attorney are in agreement that the case need not be submitted, dissent of other regional personnel need not be considered.

All questions in a case should be submitted simultaneously and should be clearly posed. Normally, the entire file should be sent in. It is not required that the parties be notified that the case is to be submitted to the Division of Advice. However, the file should indicate the positions of the parties with respect to the advice issues. Where the parties have not had the opportunity to submit their positions, they should be notified and invited to submit their positions promptly. As the statements of positions must be promptly submitted, the Region will not be significantly delayed in the preparation of its advice submission.

Credibility issues should not be submitted for resolution. If differences of opinion on credibility exist in the Region, they should be noted in the file; but the Regional Director must make the regional determination (sec. 10060).

All cases remanded to the Regions by the Division of Advice are to receive priority treatment and such further investigation as may be required shall be conducted immediately. The Region should return all remanded cases to Washington within 7 days after receipt, unless the nature or extent of the further investigation required or the unavailability of essential witnesses prevents prompt resubmission. Where the information requested can be transmitted conveniently by telephone or teletype, this means of communication should be utilized. In the event the further investigation cannot be completed and the case will not be resubmitted within a 7-day period, the Division of Advice should be notified of the reason for the delay and given an estimate of the additional time required.

11750.1 Special and Miscellaneous Litigation; Collateral Suits in Federal or State Courts

Whenever the Board or its agent may be sued or whenever a request is made that the Board intervene in private litigation, telephone the information to the Assistant General Counsel, Special Litigation. (See also secs. 10024.2, 11005, 11300.1.) Pleadings and papers, as received, should be forwarded by the quickest means to:

Office of the General Counsel

Attention: Assistant General Counsel, Special Litigation, Appellate Court Branch, Division of Enforcement Litigation

(Regions should also apprise their Assistant General Counsels in Division of Operations Management of these actions.)

In suits where injunctive relief is sought, call the Assistant General Counsel, Special Litigation, as soon as possible, and send all relevant papers via special delivery.

11751 C Cases

11751.1 Generally

Regional Directors are authorized to approve *unsolicited* withdrawals in all cases that would otherwise be submitted for advice, except where complaint has already been authorized by the Division of Advice. As to the approval of settlement agreements in advice-type cases, see section 11751.2. In all other proposed dispositions (i.e., complaint, dismissal, solicited withdrawals, or unsolicited withdrawals after complaint has been authorized by Advice), the Regional Director should submit to the Division of Advice any case falling within the classifications set forth in the current General Counsel memorandum dealing with this matter. The specific categories of cases to be submitted to Division of Advice are not set forth in this manual as they are revised on May 1 and November 1 of each year by issuance of a General Counsel memorandum. See for example G.C. Memo 86-11. General Counsel memoranda are available to the public.

The classification system used in the General Counsel's memoranda is as follows: The letters "MS" mean mandatory submission for all cases arising in the area. The letters "DS" refer to subject matter areas that *may very well* involve novel, complex, or doubtful issues, or policy issues. In these "DS" areas, the Regional Director should fully consider whether the case involves such issues, and the Region should be especially careful in its research. If there is a relevant guideline memorandum, it should be reviewed, together with postmemorandum decisions. However, the final decision as to whether to submit a case in one of the "DS" areas is that of the Regional Director. Finally, the letter "X" indicates subject matter areas that would not be specifically listed any longer. It is, of course, understood that cases in areas that are not listed may nonetheless involve novel, complex, or doubtful issues, or policy issues. If the Regional Director finds this to be the case, the matter should be submitted to Advice. As to matters that are interregional or national in scope or importance, the Regions should consult with Division of Operations Management to insure uniform handling and Washington awareness of the cases. If Division of Operations Management believes that the issues require Advice consideration, it can direct that the case(s) be sent to Advice.

Section 10(j) requests should be submitted to Division of Advice except where the regional director would dismiss the charge on the merits, or where clearance is obtained from the Division of Operations Management to deny the 10(j) request (see sec. 10310.1).

NOTE: In all cases pending on advice, and in order to avoid unnecessary work by the Division of Advice, any subsequent developments (such as withdrawals, settlements, private adjustments) should be reported to the division promptly. This is especially important in cases involving injunctive relief.

11751.2 Settlement Agreement

The Regional Director should submit to the Division of Operations Management any settlement agreement, before approval, which he/she finds to involve the following:

a. Remedial aspect of a settlement is based on new or novel concepts.

b. Cases where the notice posting is waived or is for less than 60 days (sec. 10132.1).

11751.3 Special Matters to Be Submitted to the Division of Operations Management Prior to Issuance of Complaint

a. Cases where investigation of charge indicates that the conduct complained of may also constitute noncompliance with a pending administrative law judge's decision, Board order, or court judgment in a prior case.

b. Before naming an attorney as a party respondent and/or agent of the respondent in the commission of unfair labor practices.

c. In cases in which the alleged unfair labor practices also violate the Occupational Safety and Health Act administered by the U.S. Department of Labor, the Region should refer to G.C. Memos 75-29 and 79-94 for instructions regarding submission of items to Division of Operations Management.

d. In cases in which the alleged unfair labor practices also are violative of the Federal Mine Safety and Health Act of 1977 administered by the U.S. Department of Labor, the Region should refer to G.C. Memo 80-10 for instructions regarding items to be submitted to Division of Operations Management.

11751.4 Prehearing and Hearing

Clearance from the Division of Operations Management should be obtained before:

a. Issuing investigative subpoenas in certain situations (secs. 10252 and 11770)

b. Issuing trial or hearing subpoenas if there are new or doubtful legal problems of enforceability (secs. 11772 and 11790)

c. Consolidation of cases in situations other than those set forth at section 11720.2

d. Severance of consolidated cases except as permitted by section 11720.3

e. Seeking enforcement of subpoena where between decision to issue and necessity of enforcement, intervening circumstances create enforcement problems (sec. 11790)

f. Denying request of private party for enforcement of subpoena (sec. 11790.1)

g. Introducing in evidence matters of a confidential nature (sec. 10398)

h. Travel by a trial attorney to appear at the taking of a deposition outside his own Region, where this appears necessary (sec. 10352.5).

11751.5 Posthearing

Washington clearance should be sought in the following matters from the Washington division or branch indicated in each subsection:

a. If the administrative law judge's decision embodies novel or complex policy questions (sec. 10430.1) (Division of Operations Management)

b. Normally responsibility for determining whether exceptions to an administrative law judge's decision should be filed rests with the Region. Exception: where complaint was authorized by any division or branch in Washington the Region should make a recommendation to that branch or division as to filing of exceptions. (This should be done promptly so that a decision can be made within the time for exceptions to be filed.) Where the theory of a desired exception is other than that on which the case was originally tried or where a new and novel issue is involved, clearance should be obtained from the Division of Operations Management (sec. 10438.3).

c. Before requesting oral argument before the Board (sec. 10438.5) (Division of Operations Management)

d. Before filing a motion for reconsideration of a Board order (sec. 10452) (Division of Operations Management)

e. Before filing an opposition to other party's motion for reconsideration where new or novel legal problems are involved (sec. 10452) (Division of Operations Management).

11751.6 Compliance

Compliance with settlement agreement, administrative law judge's decision, Board order, or court judgment should be cleared with the Division of Operations Management in the following situations:

a. If proposed compliance does not include posting of notice to employees (secs. 10132.1 and 11751.4)

b. In new or novel situations (sec. 10520)

c. Before accepting cash settlements in lieu of reinstatement (sec. 10528.5)

d. Before permitting cross-examination of discriminatees concerning their interim earnings and search for work as a prerequisite to settlement (sec. 10634)

e. Before issuing complaint on new charge where noncompliance in prior case may be involved

f. In cases posing unusual or close issues relating to the posting of side notices by respondents.

11751.7 Backpay

Clearance should be sought from the Division of Operations Management:

a. Before institution of formal proceedings absent a court judgment or stipulation waiving enforcement (sec. 10652.1)

b. Before acceptance of compliance with an administrative law judge's decision, Board order, or court judgment, on other than an equal proportionate basis (secs. 10636.1 and 11751.2)

c. Before accepting an offer of lump sum settlement that is less than amount found due and does not comply with standards set forth in section 10628.1 (see also sec. 10629)

d. Before agreeing to cash settlement in lieu of reinstatement (sec. 10528.5)

e. Before backpay is obtained from the respondent or disbursed if standards are not complied with (except in informal settlements prior to hearing) (secs. 10570–10571)

f. Before including backpay matters in ULP hearing (sec. 10650)

g. Before issuing notice of hearing without backpay specification (sec. 10654.2)

h. Before testimony of compliance officer regarding backpay computation (sec. 10716.1)

i. Before extended delay in service of backpay specification (after court judgment) (sec. 10574.1)

j. Before withdrawal of specification where settlement reached does not meet all of the criteria set forth in section 10571 (sec. 10674.1).

11752 10(k) Situations

For the handling of 10(k) situations generally see sections 10208–10214 and G.C. Memo 73-82, and any modifications thereto that may subsequently issue. Note particularly clearance from the Division of Operations Management should be obtained in the following:

a. Before scheduling hearing for less than 11 days after service of notice of hearing (sec. 10210.2b, c)

b. Before designating a case as involving national defense if other than a missile or space site case (sec. 10210.3).

11754 R Cases

11754.1 General

All requests for advice in representation cases except as set forth in Sec. 11754.2 should be directed to the Board through the Executive Secretary. Normally, requests for advice with respect to substantive law will not be submitted to the Board as the Regional

Director is expected, in his/her decisionmaking capacity, to apply Board precedent and to decide questions of statutory interpretation. Sec. 11273. In unusual cases presenting novel issues, the Regional Director may exercise discretion and transfer such matters to the Board for decision.

Advice, clearance, or authorization should be sought from or notification given to the Board, the Executive Secretary or the Director of Representation Appeals in the following circumstances:

(a) Where no-raiding procedures are involved; Secs. 11018.1, 11018.2, and 11019

(b) Prior to any relaxation of the rule requiring a 30-percent showing of interest of petitioner; Sec. 11023.1

(c) If an officer or responsible agent of the petitioner was responsible for or had knowledge of and condoned submission of a forged showing and the remaining valid showing satisfies the interest requirement; Sec. 11029.3(b)

(d) Before treating exceptions or a request for review as a motion for reconsideration; Secs. 11100.3, 11274, 11364.8, and 11394.8

(e) Where a petitioner wishes to withdraw a petition after a valid election; Sec. 11116.1

(f) Where the validity of the showing of interest has been raised in a request for review; Sec. 11274

(g) Where the date of an election has been set and a request for review is filed with the Board; Secs. 11274 and 11302.1

(h) Where the date of an election has been set and a motion for reconsideration has been or is to be filed with the Board; Sec. 11282

(i) Before updating the eligibility list used in a runoff; Sec. 11350.5.

11754.2 Advice Clearance, or Authorization From Operations Management

Submission for clearance is not required before referring to other Federal or state agencies possible violations of other statutes, except there is a requirement of clearance when the potential violation concerns possible criminal conduct related to Agency proceedings. Examples are forgery of authorization cards, perjury, or obstruction of justice in connection with NLRB proceedings. Similarly, there is a clearance requirement prior to referral if alleged unethical conduct of attorneys is involved. Sec. 11054.3.

Submission for clearance is required before:

(a) Issuing investigative subpoenas in certain situations; Secs. 10252 and 11770

(b) Issuing hearing subpoenas if there are new or doubtful legal problems of enforceability; Sec. 11772

(c) Consolidation of cases in situations other than those set forth in Sec. 11720.2

(d) Severance of consolidated cases, except as permitted in Sec. 11720.3

(e) Payment of special fee for expert testimony; Sec. 11780

(f) Seeking enforcement of subpoena where, between decision to issue and necessity of enforcement, intervening circumstances created enforcement problems

(g) Denying request of private party for enforcement of subpoena; Sec. 11790.1

(h) Taking action pursuant to Section 102.66(d)(1) or (2) of the Rules and Regulations concerning misconduct by parties during or outside an R case hearing; Sec. 11182.1

(i) Filing a motion for reconsideration of a Board decision or an answer to such a motion filed by any other party that raises new or novel legal problems; Secs. 10452 and 11751.5(e)

(j) Preparing and conducting last-offer elections; Sec. 11520

(k) Notifying voters of an election by newspapers, radio, or television; Sec. 11314.7(b)

(l) Obtaining non-Board personnel to participate in the conduct of an election

(m) Requesting an administrative law judge to handle a complex hearing on objections/challenges; Sec. 11424.1.

11756 Format and Content of "Request for Advice"

Submit an original and seven copies of transmittal memo, mark one copy "Division of Operations Management." Caption the memo "Request for Advice" and arrange under the following headings:

a. Charge

b. Issues (note clearly the specific issues on which advice is sought)

c. Facts (set forth concise statement of relevant facts including the resolution of credibility)

d. Region's position (spell out Region's position respecting each issue, indicating any differences among the regional personnel involved)

e. Analysis (each position—under d above—should be supported in the analysis and pertinent facts set forth. Analysis should be only as comprehensive as regional time permits)

f. Related cases, if any (note current status of all related cases).

11770–11828 SUBPOENAS

Section 11(1) of the Act provides that the Board, or any Member, may issue subpoenas calling for attendance and testimony of witnesses or the production of evidence in any investigation or proceeding.

NOTE: Effective December 14, 1970, Section 11(3) of the Act was repealed by P.L. 91-452, which substituted therefor provisions on immunity of witnesses under Title 18, U.S.C. including subsections 6002 and 6004. See also Rules and Regulations

102.31(c) effective 12–14–70. Therefore, whenever a witness in a Board proceeding claims privilege, it is necessary for the Agency to obtain the Attorney General's approval before compelling the witness to testify or provide other information. Requests for such authorization and the reasons in support thereof should be addressed to the Division of Operations Management.

11770 Investigative Subpoenas

During certain investigations, in both R and C cases, resort to subpoenas will be necessary in order to ascertain the facts on which to base an administrative decision on the merits.

(Since the object of investigative subpoenas is the ascertainment of facts on which administrative decisions may be based, they should not be used *after* a regional decision to issue complaint unless Division of Operations Management clearance has been procured.)

There is no comparable right to an investigative subpoena available to parties other than General Counsel.

11770.1 Application for Investigative Subpoena

The investigative subpoena should be requested of the Regional Director by the attorney assigned to the case. (If no attorney assignment has been made up to this point, it should now be made.) The application, in writing, should contain a statement of the scope of the information or documents sought and of their relevance.

11770.2 Issuance by Regional Director

The Regional Director, *where there are no foreseeable problems of enforceability*, has authority to issue an investigative subpoena without clearance by the Division of Operations Management:

a. Where a potential witness or custodian of needed records is willing to testify or to produce the records only if subpoenaed;

b. Where the object of the desired subpoena is the ascertainment of "commerce" data; the party to be called is a party to the case or the records required are those of a party to the case; *and* there is reasonable cause to believe that the Board would assert jurisdiction;

c. Where the object of the desired subpoena is the procurement of an eligibility list for an impending election; or

d. Where the object of the desired subpoena is the procurement of a payroll list of unit employees to determine the majority status of a union in a C case (sec. 10058.4).

Clearance by the Division of Operations Management should be sought in all other situations. Requests for clearance should contain a copy of the memorandum accompanying the application, any other information deemed relevant, and the Region's recommendations.

Investigative subpoenas, when issued, should be returnable at a time certain before the Regional Director, where this is at all practicable.

11770.3 Reports to the Division of Operations Management

When problems of enforceability arise following clearance by the Division of Operations Management to issue investigative subpoenas, the Regional Director should report developments on the matter thereafter to the Division of Operations Management.

11772 Trial or Hearing Subpoenas

The need for subpoenas calling for testimony or the production of records at a C or R hearing is a matter initially to be determined by the attorney or other Board agent involved, in consultation with his/her supervisor.

In addition to the necessity for the subpoena, however, counsel must take into consideration the potential enforcement of the subpoena. The subpoena should not be requested if it appears that it cannot be enforced in the event of noncompliance. Furthermore, if there are new or doubtful legal problems of enforceability, the matter should be submitted to the Division of Operations Management before the subpoena is requested.

11772.1 Application for Subpoena

Application for a subpoena made prior to the hearing (whether by a Board agent or by other parties) should be made to the Regional Director; one made at the hearing should be made to the administrative law judge or hearing officer, as the case may be, and may be made *ex parte*. The Rules and Regulations call only for a written application for subpoenas; neither the name of the witness nor the description of the documents need be included.

For supervisory purposes, a Regional Director may require staff members to notify him/her of the name of any person whose testimony is being sought and the description of any documents whose production is being sought, and to explain the necessity therefor.

11772.2 Issuance by Regional Director

Where prehearing application has been made of the Regional Director, he/she issues the requested trial or hearing subpoena.

11774 Persons Subpoenaed

All witnesses the trial attorney expects to use at the hearing should be subpoenaed. Exceptions may be made where the witness has a definite personal interest or stake; e.g., a charging party, an 8(a)(3), or an 8(b)(2).

Where Board personnel are subpoenaed, see *Subpoenas of and Testimony by Board Personnel*, sections 11820–11828.

11776 Subpoenas Duces Tecum

A subpoena duces tecum should be drafted as narrowly and specifically as is consistent with the ends sought. It is desirable that the use of the word "all" in the description of records be avoided wherever possible. For example, the phrase "the corporate records showing total purchases" might be substituted for the phrase "all books, records, documents, and other writings that will show total purchases." In all but the exceptional case, it is advisable to provide, *in the body of the subpoena*, for alternatives in lieu of physical production; e.g., that the party against whom the subpoena runs may furnish a signed statement setting forth the desired information, provided that pertinent records are made available to Board agents for the purpose of checking the accuracy of the statement.

In the case of a corporation or partnership, where the identity of the person who has legal custody of the records desired is known and where the same person is the one whose "explanatory" testimony is necessary, the subpoena duces tecum should be addressed to him/her. Where the legal custodian and/or person who can explain the records is unknown, a subpoena duces tecum should be addressed to the corporation, the style under which partnership operates, or one of the partners; and a subpoena ad testificandum should be served on a person who is known or believed to be familiar with the records.

11778 Service

Subpoenas may be served personally, by certified mail, by telegraph, or by delivery at the principal office or business address of the person required to be served. (See Sec. 11(4) of the Act.) A copy of the subpoena shall also be served on any attorney or other representative of the party or witness who has entered a written appearance in the proceeding on behalf of the party or witness. If a party or witness is represented by more than one attorney or representative, service on any one of such persons in addition to the party or witness shall satisfy this requirement. See section 10340.

Although no particular period of notice is prescribed, the witness should be served sufficiently in advance of the time when he/she is to appear to enable witness to make necessary arrangements for appearance but, at any rate, in sufficient time to allow him/her 5 days to petition to revoke said subpoena if the witness so desires. Thus, enforcement proceedings, noting therein the failure to file a petition to revoke, may be instituted more promptly. Form NLRB-4685, Notification of Change of Address, may be enclosed with the subpoena.

Claim form for payment of fees and mileage should be enclosed with the subpoena when it is mailed, or given to the witness if the subpoena is hand delivered.

There is no obligation on the part of the General Counsel (as opposed to outside parties) to tender witness fees at the time of service. In cases of need or emergency—but this is to be discouraged—travel accommodations, purchased by travel request, may be furnished in advance (GTR number must be reported on the witness claim).

11780 Witness Fees

Witnesses subpoenaed by the General Counsel should be advised that they are entitled to appearance fees and travel expenses, if they make the appropriate claim. Witnesses are paid $30 for each day in which they are required to appear, and are also reimbursed for travel, lodging, and meal expenses. Since the amounts and terms of these reimbursements may vary from time to time, it will be necessary for the trial attorney to refer to the latest Administrative Policy Circular or G.C. memoranda in order to ascertain current terms and rates for reimbursement.

Where a respondent subpoenas employee witnesses, one should attempt to ascertain if those witnesses who appeared were tendered fees and travel expenses. If it comes to the agent's attention that a respondent refuses to pay appropriate witness fees, its action should be viewed as a violation of Section 8(a)(4) and (1) and an appropriate complaint should issue if a charge is filed. *Howard Mfg. Co.*, 231 NLRB 731 (1977).

Those expected to make a claim should be cautioned to make such claim to the trial attorney promptly on discharge under the subpoena. Claim forms should be prepared in advance for every witness subpoenaed. The form should be completed at the hearing for any witness who wishes to make a claim, and he/she should sign the claim on discharge. Approval of a witness fee claim is made by the trial attorney.

Although witnesses called by an employer or union are often compensated *for time lost* from their jobs while appearing and testifying, there is no like compensation paid by the Government.

11782 Petition to Revoke

If a subpoenaed person does not intend to comply with the subpoena, he/she may, within 5 days, file a petition to revoke.

Petitions to revoke are available both for subpoenas ad testificandum and for subpoenas duces tecum.

Moreover, they may be based on the ground that the evidence the production of which is being required does not relate to any matter under investigation, that the subpoena under attack does not describe with sufficient particularity the evidence the production of which is required, *or if for any other reason sufficient in law the subpoena is otherwise invalid*.

11782.1 Petition Filed Prior to Hearing

A petition filed prior to a hearing is filed with the Regional Director. If the subpoena under attack is an *investigative subpoena* in a C case, the Regional Director should refer it to the Board for ruling; if it is a *hearing subpoena in a C case*, the petition should be referred to the administrative law judge and with a copy of the subpoena attached. If it is either an investigative or hearing subpoena *in an R case*, the Regional Director may rule on it or refer it to the hearing officer.

11782.2 Petition Filed at Hearing

If the petition to revoke is filed *at* a hearing, it should be filed with and ruled on by the administrative law judge or hearing officer, as the case may be.

11782.3 Notice of Filing

Notice of the filing of the petition to revoke (which need not have been served on all parties) should promptly be given by the Regional Director, administrative law judge, or hearing officer, as the case may be, to the party at whose request the subpoena was issued.

11782.4 Five-Day Period

A problem arises when a subpoena duces tecum, served shortly before or during a hearing, is returnable forthwith or otherwise short of the 5 days from service allowed for a petition to revoke pursuant to Section 11(1) of the Act and Section 102.31(b) of the Rules. Is the person served entitled to a continuance for the remainder of the 5-day period merely on signifying that he/she intends to file a petition to revoke? It may, of course, be argued, in rebuttal (if it is true), that no prejudice could result by making the person file or testify even though the time had not expired, absent a showing of grounds for revocation. The court decision in *NLRB v. Strickland*, 220 F.Supp. 661 (D.C.W. Tenn., 1962), affd. 321 F.2d 811 (6th Cir. 1963), is authority for viewing the 5-day period as a maximum and not a minimum insofar as subpoenas ad testificandum are concerned, but that issue as regards subpoenas duces tecum has not been judicially resolved with finality and administrative law judges have not been definitive. As earlier indicated, wherever possible, service should be made at least 5 days before the return date.

11782.5 Not a Part of the Record

Actions and documents in connection with petitions to revoke, including rulings, do not go into the record unless the aggrieved person specifically requests it.

11790–11806 ENFORCEMENT OF SUBPOENA

11790 General

A decision to issue a subpoena carries with it prima facie authority to enforce; and, normally, clearance to enforce will not be necessary. Where, however, there have been intervening circumstances (between decision to issue and necessity of enforcement) that create enforcement problems, the matter of enforcement should be referred to the Division of Operations Management for clearance, and consultation with Division of Enforcement Litigation to determine whether novel legal issues may be involved (sec. 11790.4). Example: Where novel contentions were made in an unsuccessful petition to revoke.

Where intervening circumstances have made enforcement unnecessary as a practical matter (e.g., where an election can be or has been conducted on an “affidavit”

basis in the absence of compliance with a subpoena calling for a list of eligible voters), enforcement proceedings should not be instituted.

11790.1 Enforcement of Subpoena Issued at Request of Private Parties

Section 11(2) of the Act provides that subpoena enforcement proceedings must be instituted "upon application by the Board." The Rules and Regulations provides that proceedings for enforcement of subpoenas issued at the request of a private party shall be instituted by the General Counsel in the name of the Board "on relation of such private party" but only if, in the Board's judgment, the enforcement of such subpoena *would be consistent with law and with the policies of the Act.*

Examples of questions falling in this category are subpoenas of Board personnel or documents and cases where Board processes are being abused. Requests should not be *denied* without Washington clearance; doubtful cases should be submitted; the proceeding may be instituted forthwith otherwise.

The Regional Office shall institute subpoena proceedings and keep the Division of Operations Management informed if unusual circumstances arise.

11790.2 Enforcement of Subpoena Issued at Request of the General Counsel

Enforcement proceedings with respect to subpoenas requested by the General Counsel are handled by the Regional Office involved (secs. 11751.4(b), 11754.2g).

11790.3 Papers and Pleadings to Washington; Enforcement Proceedings

The Region should forward to the Division of Operations Management, on an up-to-date basis, the following documents or information:

a. Conformed copy of Board's application and court's show-cause rule

b. Copies of respondent's answer and motions, if any

c. Copies of briefs or memorandums filed by Board or respondent

d. Court action after argument on rule

e. Copies of court decision and order

f. Further information bearing on the proceeding.

11790.4 Appeal Proceedings

Appeal proceedings will be handled by the Division of Enforcement Litigation. For that reason, special problems arising during enforcement that may create problems in the appeal should be referred to the Assistant General Counsel, Special Litigation, Appellate Court Branch.

11792 Procedure

It must be kept in mind that certain U.S. district courts follow practices peculiar to their own local setting. For example, the Southern District of New York, as possibly the other Federal courts in New York State, follows the code practice in the courts of that

State of requiring applications for orders to show cause, which are presented ex parte, to recite that no prior application has been made for the relief requested. Other district courts may also have requirements peculiar to their locale. In preparing papers, keep that factor in mind and check with the clerk of the court for conformity of proposed application with the particular procedural requirements of that court.

Under Rule 11 of the Federal Rules, "verification" is not required when the petition is signed by counsel, unless the verification is otherwise required by statute or rule. While it is likely that all district courts follow the Federal Rules, it is well to check the local rules of the district court in which the proceeding is brought to determine whether the petition need be verified.

11792.1 Patterns Provided

Four pattern forms suited for general use in subpoena enforcement proceedings are provided:

Pattern 51	Rule to show cause (sec. 11806.1)
Pattern 52	Application for order requiring obedience to subpoena duces tecum (see sec. 11802.1)
Pattern 53	Application for order requiring obedience to subpoena ad testificandum (see sec. 11800.1)
Pattern 54	Notice of institution of proceeding to compel obedience to subpoena ad testificandum (see sec. 11804.1)

11792.2 Service by Registered Mail

For language setting out service of subpoena by registered mail, see paragraph e of pattern 52.

11792.3 Personal Service

For language setting out personal service, see paragraph d of pattern 53.

11792.4 Revocation

Paragraph f of pattern 52 sets out the statutory procedure for administrative revocation of the subpoena, and alleges that the respondent failed to utilize this procedure. This allegation will support a contention that the respondent is estopped from questioning the validity of the subpoena or the materiality of the evidence requested. Such a contention was sustained in *NLRB v. Brown & Root* (D.C. Tex., unreported, decided May 19, 1949); see also *NLRB v. Brown*, 5 LC ¶ 60,986 (D.C. Ala. 1942) 11792.4.

11792.5 Motion to Quash

If the respondent did move to quash the subpoena and the motion was denied, use paragraph e of pattern 53. Paragraph f of pattern 52 alleges that the respondent did not appear in answer to the subpoena.

11792.6 Refusal to Testify

If the respondent did appear at the hearing but refused to testify or produce the required records, see paragraph f of pattern 53.

11794 Jurisdiction

11794.1 Jurisdiction of Board to Issue Subpoenas

Section 11(1) of the Act grants statutory authority to the Board for exercise of subpoena power, which is similar to that of other administrative agencies. The intent of Congress to confer such authority is clear (see S. R. No. 573, 74th Cong., 1st Session; sec. 6(c) of the Administrative Procedure Act, 5 U.S.C. § 556(c)) and the courts have long upheld the power of administrative agencies to issue subpoenas (see *Interstate Commerce Commission v. Brimson,* 154 U.S. 447 (1894); *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186 (1946)).

11794.2 Jurisdiction of Courts to Enforce Subpoenas

The district courts receive their power to order enforcement of subpoenas issued by the Board by virtue of Section 11(2) of the Act. The granting of such power has been approved and exercised repeatedly by the courts. The Administrative Procedure Act, section 6(c), 5 U.S.C. § 556(c), has affirmed the courts' jurisdiction in this respect.

11794.3 Collateral Proceedings

The respondent's denial that it is engaged in interstate commerce and therefore not subject to the Board's jurisdiction does not give it the right to have that issue determined by the court in a subpoena enforcement proceeding. See also *NLRB v. Barrett Co.*, 120 F.2d 583 (7th Cir. 1941), where the court upheld the Board's right to enforcement of a precomplaint subpoena calling for commerce data. *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, 214(1894) 11794; *Endicott Johnson Corp. v. Perkins,* 317 U.S. 501 (1943); *President v. Skeen,* 118 F.2d 58 (5th Cir. 1941); *Walling v. Benson,* 137 F.2d 501 (8th Cir. 1943); *NLRB v. Northern Trust Co.*, 56 F.Supp. 335 (D.C. Ill. 1944), affd. 148 F.2d 24 (7th Cir. 1945). The Board has exclusive power to make the initial determination of its jurisdiction in any case pending before it. *American National Bank,* supra; *Oklahoma Press Pub. Co.,* supra. Cf. *Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41 (1938), where Bethlehem sought to attack the Board's jurisdiction in an injunction proceeding. The Administrative Procedure Act has not changed this rule. (See sec. 6(c), 5 U.S.C. § 556(c).)

11796 Relevance

The testimony or documentary evidence sought to be adduced by enforcement of a subpoena must be relevant to the matter under investigation or in question before the Board. This requirement is usually satisfied by an allegation showing the relevancy of the evidence sought with reference to the petition or charge, or complaint or notice of

hearing, which is attached to the application as an exhibit. *Oklahoma Press Publishing Co.*, supra, 214–215.

11798 "Fishing Expedition" as a Defense

It can well be anticipated that the respondents will contend in many instances where enforcement of a subpoena duces tecum is sought that the Board is seeking to engage in a "fishing expedition." Obviously, the answer to such a contention is found in the careful draftsmanship of the subpoena. Books, records, etc., required to be produced, should be described with certainty and particularity both with reference to content and time period. The *Oklahoma Press* decision of the Supreme Court is especially illuminating on this problem. In that decision all of the important "fishing expedition" cases, including *Hale v. Henkel*, 201 U.S. 43 (1906); *F.T.C. v. American Tobacco Co.*, 264 U.S. 298 (1924), and *Brown v. U.S.*, 276 U.S. 134 (1928), are carefully discussed and analyzed, and many earlier misconceptions as to the state of the law cleared up. Little can be added to the opinion of the court on the subject, and all attorneys should be thoroughly familiar with the discussion and analysis, particularly *Oklahoma Press Publishing Co.*, supra, 202, 214.

11800 Pattern 53, Application for Order Requiring Obedience to Subpoena ad Testificandum

The caption on this form shows that the proceeding is brought in the name of the Board, but on relation of the party who requested the subpoena.

(If the subpoena was issued at the request of the General Counsel or his agent, see pattern 52. Whenever an *ex rel.* proceeding is brought, pattern 54, which is the notice to the relator or his attorney, should be used.)

The respondent here is an individual; if a corporation, see pattern 52.

11800.1 Pattern 53

IN THE UNITED STATES DISTRICT COURT

FOR THE _____ DISTRICT OF

_____ DIVISION

NATIONAL LABOR RELATIONS BOARD ON RELATION OF LOCAL 1, U.S.W. (Ind.)	Civil No. 13579
Applicant	Application for Order
v.	Requiring Obedience
JOHN DOE	to Subpoena ad
Respondent	Testificandum

The National Labor Relations Board, hereinafter referred to as the Board, an administrative agency of the Federal Government created pursuant to the National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.), hereinafter referred to as the Act, by its General Counsel, and by John J. Jones, its Regional Attorney for Region 42, on relation of Local 1, USW (Ind.), respectfully applies to this honorable court, pursuant to Section 11(2) of the Act, for an order requiring John Doe to obey a certain subpoena ad testificandum, issued by the Board and duly served on him in the manner provided by law. In support of said application, upon information and belief, the Board respectfully shows as follows:

a. This court has jurisdiction of the subject matter of the proceeding, and of the person of the Respondent, by virtue of Section 11(2) of the Act, in that the inquiry in aid of which the subpoena was issued was carried on within this judicial district [add or substitute any other criterion applicable under 11(2), such as that the Respondent resides or does business within this judicial district].

b. Pursuant to the provisions of Section 6 of the Act, the Board has issued Rules and Regulations (hereinafter referred to as the Rules) governing the conduct of its operations, which Rules and Regulations have been duly published in the Federal Register (24 F.R. 9095), as provided for in the Administrative Procedure Act (5 U.S.C. § 552). This court may take judicial notice of the said Rules and Regulations by virtue of 44 U.S.C. § 307.

c. Pursuant to the provisions of Section 10(b) of the Act, there is now pending before the Board an unfair labor practice proceeding entitled “Local 1, United Squibb Workers of America (U.S.W., Ind.), and Fireworks Machinery Corp.,” Case 42–CC–233, wherein there has been filed and served a charge, a complaint and notice of hearing was

issued, and an answer has been filed, all in the manner and form required by law and Sections 102.9, 102.10, 102.15, and 102.20 of the Board's Rules. Copies of the said charge, complaint and notice of hearing, and answer are annexed hereto and made part hereof, designated exhibits A, B, and C, respectively.

d. In relation to the proceeding described in paragraph c, above, the Board did cause to be issued, on January 2, 19__, at the written request of the relator, USW (Ind.), a subpoena ad testificandum, directed to Respondent John Doe, requiring said Respondent to appear and testify at a hearing before an administrative law judge of the Board to be held on January 7, 19__, at 1 o'clock in the afternoon in the hearing room of the Board located at 4 Mammoth Drive, Zenith City, State of Nebraska, all in the manner and form provided for in Section 11(1) of the Act and Section 102.31(a) of the Rules. Said subpoena was duly served on Respondent John Doe by personal service on him thereof, in the manner provided for by Section 11(4) of the Act and Section 102.111 of the Rules. Copies of the subpoena and the affidavit of service thereof are attached hereto marked "exhibits D and E," respectively.

e. Pursuant to Section 11(1) of the Act and Section 102.31(b) of the Rules, said Respondent John Doe did, on January 7, 19__, file with Ringer S. Williams, the Administrative Law Judge designated by the Board to hear the case, a motion to revoke the subpoena, on certain grounds herein set forth, which motion was denied by the Administrative Law Judge by formal order issued on January 21, 19__. Copies of the motion to revoke the subpoena and the order denying the motion are annexed hereto marked "exhibits F and G," respectively.

f. Pursuant to said subpoena, Respondent John Doe did appear at the hearing before the Administrative Law Judge on January 28, 19__, and was sworn as a witness in said proceeding. Questions were propounded to him by counsel for relator U.S.W. (Ind.), which questions the Respondent refused to answer on the ground of irrelevancy and immateriality. The Administrative Law Judge, upon consideration of the purpose of the examination, ruled that the evidence sought was relevant and material to the issues in litigation before him, and directed the Respondent to answer. The Respondent refused to comply with the ruling of the Administrative Law Judge, withdrew from the witness stand, and left the hearing room. The Administrative Law Judge, ruling that the testimony of said Respondent John Doe is necessary and pertinent to a resolution of the issues pending in said unfair labor practice proceeding, adjourned the hearing to afford applicant an opportunity to institute these proceedings to compel Respondent John Doe to testify as required by law. A copy of the pertinent portion of the transcript of the hearing before the Administrative Law Judge is annexed hereto marked "exhibit H."

g. The refusal of Respondent John Doe to give testimony in obedience to the subpoena ad testificandum, as directed by the Administrative Law Judge, which testimony is relevant and material to the issues in the proceeding before the Board, constitutes contumacious conduct within the meaning of Section 11(2) of the Act, which conduct has impeded and continues to impede the Board in the investigation of the matters before it, and has prevented and is preventing the Board from carrying out its duties and functions under the Act.

WHEREFORE, the applicant, National Labor Relations Board, respectfully prays:

(1) That an order to show cause issue forthwith directing the Respondent, John Doe, to appear before this court on a day certain to be fixed in said order, and that he show cause, if any there be, why an order should not issue directing him to appear before Ringer S. Williams, the Administrative Law Judge designated by the Board in Case 42–CC–233 pending before said Board, at such time and place as said Administrative Law Judge may designate, and there give testimony and answer any and all questions relevant and material to the matters under investigation and in question in said proceedings before the Board;

(2) That upon the return of said order to show cause, an order issue out of this court requiring the Respondent, John Doe, to appear before said Administrative Law Judge, Ringer S. Williams, at a time and place to be fixed by said Administrative Law Judge, and there give testimony and answer any and all questions relevant and material to the matters under investigation and in question in said proceedings before the Board; and

(3) That the applicant, National Labor Relations Board, have such other and further relief as may be necessary and appropriate.

Dated, Zenith City, Neb.

this _____ day of March 19__

National Labor Relations Board
By _____
General Counsel

_____
John J. Jones
Regional Attorney
Region 42
4 Mammoth Drive
Zenith City, Neb.

11802 Pattern 52, Application for Order Requiring Obedience to Subpoena Duces Tecum

This form is designed to be used where the subpoena issued at the request of the General Counsel or his agent, and was directed to a corporate respondent; for situations where the subpoena was issued at the request of a private party, or where the respondent is an individual, see pattern 53 (sec. 11800.1).

11802.1 Pattern 52

IN THE UNITED STATES DISTRICT COURT

FOR THE _____ DISTRICT OF

_____ DIVISION

NATIONAL LABOR RELATIONS BOARD

Applicant	Civil No. 13579
v.	Application for Order
GOODWILL R. R. CO.	Requiring Obedience to
Respondent	Subpoena Duces Tecum

The National Relations Board, hereinafter referred to as the Board, an administrative agency of the Federal Government created pursuant to the National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.), hereinafter referred to as the Act, by its General Counsel, and by John J. Jones, its Regional Attorney for Region 42, respectfully applies to this honorable court, pursuant to Section 11(2) of the Act, for an order requiring the Goodwill R. R. Co. to obey a certain subpoena duces tecum, issued by the Board and duly served on it in the manner provided by law. In support of said application, upon information and belief, the Board respectfully shows as follows:

a. This court has jurisdiction of the subject matter of the proceeding, and of the Respondent, by virtue of Section 11(2) of the Act, in that the inquiry in aid of which the subpoena was issued was carried on within this judicial district, and the Respondent is a domestic corporation chartered under the laws of the United States and licensed to do business in the State of Nebraska, maintaining an office for that purpose at 125 Omnibus Avenue, Zenith City.

b. Pursuant to the provisions of Section 6 of the Act, the Board has issued Rules and Regulations (hereinafter referred to as the Rules) governing the conduct of its operations, which Rules and Regulations have been duly published in the Federal Register (24 F.R. 9095), as provided for in the Administrative Procedure Act (5 U.S.C. § 552). This court may take judicial notice of the said Rules and Regulations by virtue of 44 U.S.C. § 307.

c. Pursuant to the provisions of Section 10(b) of the Act, there is now pending before the Board an unfair labor practice proceeding, *Fireworks Machinery Corp. (Local 1, United Squibb Workers of America (U.S.W. Ind.))*, Case 42–CA–233, wherein there has been filed and served a charge, a complaint and notice of hearing has issued, and an answer has been filed, all in the manner and form required by law and by Sections 102.9, 102.10, 102.15, and 102.20 of the Board's Rules. Copies of the said charge, complaint

and notice of hearing, and answer are annexed hereto and made part hereof, designated exhibits A, B, and C, respectively.

d. In relation to the proceeding described in paragraph c, above, the Board did cause to be issued, on January 2, 19__, at the written request of a representative of the General Counsel, a subpoena duces tecum, directed to the Respondent, and requiring said Respondent to appear at a hearing before an administrative law judge of the Board to be held on January 7, 19__, at 1 o'clock in the afternoon, in the hearing room of the Board located at 4 Mammoth Drive, Zenith City, State of Nebraska, and to then and there give testimony and produce certain records and papers more fully described as follows:

> Records and papers in the possession of the Goodwill R. R. Co., including bills of lading, consignments, receipts, or other documents showing shipment of goods via said Goodwill R. R. Co., to and from Fireworks Machinery Corp., Zenith City, State of Nebraska, for the calendar year 1981.

Said subpoena duces tecum was issued under the authority of, and in the manner and form provided for, in Section 11(1) of the Act and Section 102.31(a) of the Rules. A copy of the subpoena is attached hereto marked "exhibit D."

e. The subpoena described in paragraph d, above, was duly served on Respondent Goodwill R. R. Co. by addressing the original thereof and sending same by registered mail to John Doe, superintendent of the Zenith City Division of said railroad, at the offices described in paragraph a, above, and receipt thereof on January 3, 19__, has been duly acknowledged, all in the manner and form provided for in Section 11(4) of the Act and Section 102.111 of the Rules. A photostatic copy of the return post office receipt is attached hereto marked "exhibit E."

f. Although Section 11(1) of the Act and Section 102.31(b) of the Rules provide for a period of 5 days after service of a subpoena within which any person served with the same and wishing to urge any objections thereto may petition the Board to revoke the subpoena, the Respondent did not within 5 days after service of the subpoena on it or at any time thereafter file any petition to revoke the subpoena. Nevertheless, said Respondent failed to appear at said hearing on January 7, 19__, in response to said subpoena or to produce the evidence as therein called for and as required by its terms, and has at all times since failed and refused and continues to fail and refuse to produce the records and documents called for in said subpoena as described in paragraph d, above.

g. The refusal of Respondent Goodwill R. R. Co. to appear and to produce the required records in obedience to the subpoena duces tecum, which records are relevant and material to the issues in the proceeding before the Board, constitutes contumacious conduct within the meaning of Section 11(2) of the Act, and by thus impeding and continuing to impede the Board in the investigation of the matters before it, the Respondent has prevented and is preventing the Board from carrying out its duties and functions under the Act.

WHEREFORE, the applicant, National Labor Relations Board, respectively prays:

(1) That an order to show cause issue forthwith directing the Respondent, Goodwill R. R. Co., to appear before this court on a day certain to be fixed in said order,

and that it show cause, if any there be, why an order should not issue directing it to appear before the Administrative Law Judge designated by the Board to take evidence in Case 42–CA–233 pending before said Board, at such time and place as said Administrative Law Judge may designate, and there produce the records described in paragraph d, above, and to give testimony and answer any and all questions relevant and material to the matters under investigation and in question in said proceedings before the Board;

(2) That upon the return of said order to show cause, an order issue out of this court requiring the Respondent, Goodwill R. R. Co., to appear before the Administrative Law Judge, at a time and place to be fixed by said Administrative Law Judge, and there produce the records described in paragraph d, above, and give testimony and answer any and all questions relevant and material to the matters under investigation and in question in said proceedings before the Board; and

(3) That the applicant, National Labor Relations Board, have such other and further relief as may be necessary and appropriate.

Dated, Zenith City, Neb.

this _____ day of March 19__.

National Labor Relations Board
By_____
General Counsel

_____
John J. Jones
Regional Attorney
Region 42
4 Mammoth Drive
Zenith City, Neb.

11804 Pattern 54, Notice of Institution of Proceeding to Compel Obedience to Subpoena ad Testificandum

Section 11(2) of the Act provides that a proceeding to enforce a subpoena issued by the Board must be instituted "upon application of the Board." Section 102.31(d) of the Rules and Regulations provides that where the subpoena was issued at the request of a private party, enforcement proceedings shall be instituted by the General Counsel in the name of the Board "but on relation of such private party." The same section further provides that "neither the General Counsel nor the Board shall be deemed thereby to have assumed responsibility for the effective prosecution" of the enforcement proceedings. Pattern 54 is designed to put the relator on notice that he is primarily responsible for prosecuting the case before the court and will also serve to establish his standing in the

court to participate in the proceedings. This form should be issued to the relator or his attorney in every *ex rel*. proceeding, and copies should be served on the respondent and filed with the court.

The filing of the application, and issuance of Pattern 54 notice, does not mean necessarily that the General Counsel will withdraw from further participation in the court proceedings. Each case must be handled on its own facts. For example, if the respondent questions the Board's jurisdiction, or its power to issue the subpoena, or the validity of the issuance, the General Counsel may wish to retain control of the trial of the case, since the issues raised go to the Board's basic authority, and an adverse decision may have an effect on other cases. On the other hand, if the respondent questions only the relevancy of the evidence sought to be adduced, the relator, who is primarily interested in obtaining such evidence, should be permitted to try the case and to prove its materiality.

11804.1 Pattern 54

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE _____ DISTRICT OF

_____ DIVISION

NATIONAL LABOR RELATIONS BOARD,
ON RELATION OF LOCAL 1, U.S.W. (Ind.)

Applicant

v.

JOHN DOE

Respondent

Notice of Institution of Proceeding to Compel Obedience to Subpoena Ad Testificandum

To: John Smith, Esquire
Address
City

Attorney for Relator

Local 1, U.S.W. (Ind.)

Sir:

Please take notice that the General Counsel of the National Labor Relations Board, in the name of the Board, but on relation of Local 1, U.S.W. (Ind.), has petitioned

the court for an order enforcing obedience to a subpoena ad testificandum issued by the Board at the request of Local 1, U.S.W. (Ind.). Attached hereto are copies of the order to show cause and the application for order requiring obedience to subpoena ad testificandum, filed with the court on _____, 19__.

This proceeding has been instituted at your request pursuant to the provisions of Section 11(2) of the National Labor Relations Act, as amended, and of Section 102.31(d) of the Rules and Regulations, Series 8, as amended, of the National Labor Relations Board. We specifically call your attention to that portion of said Section 102.31(d) of the Rules and Regulations that provides that by bringing this proceeding "neither the General Counsel nor the Board shall be deemed thereby to have assumed responsibility for the effective prosecution of the same before the Court."

_____

John J. Jones
Regional Attorney
Region 42
National Labor Relations Board

Dated this _____ day

of _____ 19__.

11806 Pattern 51, Rule to Show Cause

Although this form was drawn with relation to an application for enforcement of a subpoena duces tecum, issued to a corporate respondent, it is equally applicable, with appropriate modification, in a proceeding against an individual respondent, and in a proceeding to enforce a subpoena ad testificandum.

Note that service on the respondent may be made by serving any officer or agent, and the process may be served by registered mail or in any manner provided for in the Federal Rules (see Rules 4 and 5).

11806.1 Pattern 51

IN THE UNITED STATES DISTRICT COURT

FOR THE _____ DISTRICT OF

_____ DIVISION

NATIONAL LABOR RELATIONS BOARD

Applicant — Civil No. 13579

v. — Rule to Show Cause

GOODWILL R. R. CO.

Respondent

The National Labor Relations Board, hereinafter called the Board, by its General Counsel, and by John J. Jones, its Regional Attorney for Region 42, having filed its application for an order requiring Respondent Goodwill R. R. Co. to obey and comply with a certain subpoena duces tecum duly and properly served on said Respondent as set forth in said application, and good cause appearing therefor, it is hereby

ORDERED that Respondent Goodwill R. R. Co. appear and show cause, if any there be, in Room 200, United States Courthouse, Federal Square, City of Zenith, State of Nebraska, on the ____ day of April 19__, at 9 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order of this court should not issue directing the Respondent, Goodwill R. R. Co., to appear before a duly designated administrative law judge of the Board, at such time and place as the administrative law judge may determine, and there produce the books, papers, records, and other data described in the subpoena duces tecum served on the Respondent, and give testimony, in connection with the proceeding now pending before said Board pursuant to Section 10 of the National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.), and it is

FURTHER ORDERED that services on the Respondent of a copy of the order to show cause and of the application on which it is issued, be made on or before the ____ day of March 19__, by service thereof on any officer or agent of said Respondent, and that said Respondent shall file and serve its answer to the application not later than April _____, 19__. Service of a copy of this order, the application, and Respondent's answer, in any

manner provided for by the Rules of Civil Procedure for District Courts of the United States, or by registered mail, shall be deemed good and sufficient service.

/s/ D. W. Brown
United States District Court Judge

Dated, Zenith City

State of Nebraska,

this ____ day of March 19__.

11820–11828 SUBPOENAS OF AND TESTIMONY BY BOARD PERSONNEL

11820 General Disclosure of Documents

Section 102.117 of the Rules and Regulations describes, generally, which of the Board documents, records, and materials are open to public inspection and which are not. Further guidance with respect to the disclosure of documents contained in the case file is contained in G.C. Memos 76-13, 79-9, and 79-87. Section 102.118 provides that no Board agent shall produce any Board documents or testify with respect to information coming to his/her attention in any court or Board hearing, whether in response to a subpoena or otherwise, without the written consent of the Board, its Chairman, or the General Counsel, whoever has supervision or control of the documents or Board agent. (However, see sec. 10663 regarding production of certain material, etc., with regard to backpay specifications.) This applies to hearings of the Board itself as well as to other proceedings. (With respect to in-hearing motions for production of pretrial statements of witnesses, see secs. 10394.7, 10398 *caveat*, and 10400.)

11822 Steps to be Taken on Receiving Subpoena

When a Regional Office staff member receives a subpoena, he/she should immediately:

a. Ascertain, if possible, the nature of the testimony being sought (this is unnecessary where the subpoena is a subpoena duces tecum).

b. Notify the party on whose behalf the subpoena is being served of the existence of Rule 102.118 (do not undertake to act as an agent in requesting the General Counsel's permission to testify).

c. Apprise the Division of Operations Management of the facts, so that a request for permission to testify (if submitted) can more cogently be considered, and if novel problems are involved coordinate with the Assistant General Counsel, Special Litigation, Appellate Court Branch (sec. 11828).

If authorization is not granted, a petition to revoke or motion to quash, whichever is applicable, should be filed on appropriate grounds.

If authorization to testify is granted, the Board agent will respond to the subpoena and testify. (See sec. 11826.)

11822.1 Witness Fees and Allowances

An employee who testifies in his/her *official capacity* in *private litigation* is required to collect the authorized witness fees and allowances for expenses of travel and forward such moneys, with covering memo and certification of service, to the Finance Section. The employee is in official duty status.

11824 Motion to Quash/Petition to Revoke: With Respect to non-Board Proceedings

[A] motion to quash will, in most jurisdictions, probably be an appropriate responsive pleading only to a subpoena duces tecum. In the case of a subpoena ad testificandum the Board employee may have to appear personally and decline to answer on appropriate grounds (sec. 11827).

11825 With Respect to Board Hearings

[I]f time permits, a petition to revoke should be filed for either a duces tecum or ad testificandum subpoena. A supporting memorandum along the lines described above need not be filed unless requested by the administrative law judge or hearing officer. (See secs. 11782–11782.5 for details on petitions to revoke.)

11826 With Respect to Either Type of Proceeding

[S]hould the motion to quash or the petition to revoke be granted, there need be no further response to the subpoena. (If a petition to revoke in a Board proceeding is denied, a request for special permission to appeal to the Board should be directed to the Board.)

11827 Appearance/Testimony/Production

Should a motion to quash or petition to revoke be denied (and not reversed on appeal), should there have been insufficient time in which to file the motion or petition, or should a motion to quash or its equivalent not be applicable in the jurisdiction involved, the subpoenaed Board agent should, unless otherwise directed by the Board, the Chairman of the Board, or the General Counsel, make an appearance at the trial or hearing. The Board agent should take the oath and answer questions calling for his/her name and occupation. In answer to further questions, the agent should respectfully decline to answer or to produce records for the reasons that were previously asserted in

the motion to quash or petition to revoke, or that would have been asserted therein had one been filed.

Should prior consent have been procured, the Board agent should testify or produce records to the extent covered by the consent. With respect to other matters, except those clearly not coming to him/her in an official capacity, the agent should decline on the grounds on which permission was denied.

If the Board agent should nevertheless be ordered to give information or produce records, the attorney representing the Board agent should request a short postponement to enable him/her to communicate with Washington.

11828 Instructions to Testify or Produce Records

Should the Board agent be ordered to give information or produce records in violation of Section 102.118, the attorney representing the Board agent should request that action be held up for a short time to enable him/her to contact Washington.

The agent should communicate with the Division of Operations Management. It is anticipated that Washington, through the Division of Enforcement Litigation, will authorize institution of appropriate proceedings to test the issue, and the court or hearing officer will be so advised.

11830 COURT COSTS

11830 Recovery of Costs in Appellate Court Litigation

Rule 39 of the Federal Rules of Appellate Procedure permits the prevailing party in actions brought by or against the United States, or any agency or official of the United States acting in his official capacity, to recover costs incurred by him in the litigation.

Regional Office personnel should seek payment of court costs as part of their effort to obtain compliance with the other aspects of the court's mandate. Thus, in communications with the respondent's counsel, the compliance officer should emphasize that compliance with a court mandate includes payment of costs.

Copies of judgments of the courts of appeals may be obtained from the Appellate Court Branch, if not received in the course of ordinary distribution. Checks in payment of costs should be made payable to "Treasurer of the United States" and transmitted to the Finance Section.

Cases in which Regions are having difficulty obtaining the payment of costs should be referred to the Division of Enforcement Litigation. Checks in payment of costs should be made payable to the National Labor Relations Board and transmitted to the Deputy Associate General Counsel, Appellate Court Branch, Division of Enforcement Litigation.

Many respondents may attempt to "settle" court costs in the same manner in which offers are made to settle backpay claims. Since costs are payable to the United

States Government and constitute a claim by the Government, Regional Offices should not accept a settlement offer of court costs. Such offers should be referred to the Division of Enforcement Litigation. Thereafter, the Regions may be called on to investigate the accuracy of claims of insolvency or inability to pay the costs and to report their findings to the division. In addition, because of the nature of some of the present unpaid court costs, Regions may be asked to investigate certain pending claims of inability to pay these costs.

The administrative closing of cases in which compliance has been achieved with the exception of payment of costs should be discussed with Enforcement Litigation. See sec. 10772.

11840 SERVICE, FILING, AND COMMUNICATIONS WITH PARTIES

11840 Service of Process and Papers

For the requirement of service generally, and the acceptable methods of service, see Sections 102.111–102.114 of the Rules and Regulations. For the requirement of service of a particular pleading or other paper consult the rule provision concerning that pleading or paper.

11840.1 Service and Communications by Board Agents

Charges and amended charges, complaints and notices of hearing in C cases, final orders, administrative law judges' decisions, and subpoenas must be served personally, by registered mail, by telegraph, or by leaving a copy at the principal office or place of business of the person on whom service is sought. Other process and papers may be served by certified mail.

After a copy of a charge or petition, together with the initial communication, has been served on the parties, and an attorney or other representative has entered an appearance on behalf of a party, copies of all further documents served pursuant to Section 102.111 of the Board's Rules and Regulations, with the exception of subpoenas, will be served on the attorney or representative of record in addition to the party. If a party is represented by more than one attorney or representative, service on any one of such persons in addition to the party satisfies the requirements of Section 102.111, but as a matter of courtesy, an effort should be made to serve all counsel or representatives who have entered an appearance on behalf of the party.

It should be particularly noted that copies of the following documents and communications should be sent to the party and to the attorney or representative of record:

a. Notices and orders issued in connection with unfair labor practice hearings, representation case hearings, and 10(k) hearings

b. Regional Directors' decisions, reports, and supplemental decisions

c. Dismissal letters in unfair labor practice cases and representation cases

d. Letters approving withdrawal requests of unfair labor practice charges or representation petitions

e. Closing compliance letters

f. Consent Election Agreements and Stipulations for Certification Upon Consent Election

g. Representation case certifications.

Where arrangements for an election have been agreed to by the parties with full participation by counsel or representative, notices of election should be sent directly to the parties, with copies to counsel or representative. By the same token, the letter requesting the *Excelsior* list, which accompanies a copy of the approved consent or stipulated election agreement, may be sent to the employer, copy to counsel or representative. The *Excelsior* list supplied by the employer should be sent by the Region directly to the petitioning and intervening parties involved.

In addition, copies of correspondence that confirm some previously agreed-to arrangement or appointment may be sent to the parties involved.

Compliance communications are also covered by the foregoing instructions. However, after the requirements for compliance have been worked out and the respondent has advised us of its intention to comply, the notices that may be required, whether pursuant to an administrative law judge's decision, Board order, court judgment, or settlement agreement, the request for certification of posting, and the instructions concerning details of compliance, can be sent directly to the parties with copies to counsel or representatives.

All other communications, both oral and written, should be with or through only the attorney or representative of record. However, whenever an attorney, representative, or party requests that copies of all written communications be sent to the party or has authorized that a party or person be contacted directly, such request and/or authorization should be honored.

Where special circumstances might warrant a departure from the foregoing instructions, clearance should be obtained from the Assistant General Counsel before undertaking any direct communication with a party contrary to these instructions.

Designation of Representative as Agent for Service of Documents: See section 10040.6.

11840.2 Service by a Party

Where service of papers *by a party* on other parties is required, such service may be made by registered mail, by certified mail, or in any manner permissible in a civil action in the State of the hearing.

11840.3 Date of Service and Proof

Date of service shall be day of personal delivery or day of depositing in mail, whichever is applicable. Although proof of service is desirable in all cases, failure to furnish such proof does not affect the validity of the service.

11840.4 Computation of Period of Time

Computation of time is controlled by Rule 102.111, which reads as follows:

> . . . (a) In computing any period of time prescribed or allowed by these rules, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next Agency business day. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation.
>
> (b) When the Act or any of these rules require the filing of a motion, brief, exception, or other paper in any proceeding, such document must be received by the Board or the officer or agent designated to receive such matter before the close of business of the last day of the time limit, if any, for such filing or extension of time that may have been granted. In construing this section of the rules, the Board will accept as timely filed any document which is hand delivered to the Board on or before the due date or postmarked on the day before (or earlier than) the due date; documents which are postmarked on or after the due date are untimely: *Provided, however*, the following documents must be received on or before the close of business of the last day for filing:
>
> (1) Charges filed pursuant to Section 10(b) of the Act (see also sec. 102.14).
>
> (2) Applications for awards and fees and other expenses under the Equal Access to Justice Act.
>
> (3) Objections to elections and revised tallies.
>
> (4) Petitions to revoke subpoenas.
>
> (5) Petitions filed pursuant to Section 9(c) of the Act.

11850 FILES

11850 Case Files

The case file should reflect accurately the steps taken in and the current status of a given case. It should be so complete as to provide (1) a successor-assignee with the means whereby with a minimum of duplication, he/she may carry the case on, and (2) a supervisor with a gauge for measurement of the quality of the investigation.

11850.1 Organization of Files

Files should be so organized that specific material may be easily found. No special sectional breakdown is required_and the need for organization will often depend

on the case and on the extent of the work already done, but a desirable breakdown would consist of sections devoted to the (1) formal (public) documents, (2) memo and correspondence, (3) affidavits and statements, and (4) other documents. (Normally, for easier finding and case reconstruction, the affidavits and statements should be arranged alphabetically, the rest chronologically.)

Normally, the working file should include but one typewritten and printed copy of each item. (Exception, where an affidavit is in longhand, the original and a typed copy should be included.) Extra copies, as may appear to be necessary, should be put into a "temporary" file.

11850.2 File Should Contain Complete History of Case

There should be no "gaps." Where an item inserted in the file speaks for itself, it is unnecessary to recite the surrounding facts in a memo, but where, for example, an unsuccessful interview attempt has been made, this should be memoed; in this way, the file will show the point has not been overlooked.

From time to time, if the case is long and involved, the Board agent assigned should, by memo, bring the circumstances up to date and signify further steps to be taken.

11860 DOCUMENTARY EVIDENCE

11860 Documentary Evidence

The term "documentary evidence" means any paper whether in written, printed, graphic, or other visual form, containing facts germane to the case that might be necessary to introduce at a hearing. Documentary evidence includes letters, records, charts, pictures, affidavits, and other signed statements.

All documentary evidence should be retained in the original form if possible; otherwise, such evidence should be either photostated or otherwise duplicated. Whenever possible, at least two copies should be available for use.

Unless the source and the circumstances of receipts are self-explanatory, they should be recited in a memorandum.

No marks should be made on documentary evidence. Notes, questions, remarks, or instructions should be inserted on separate sheets and not on the face of the document. This is particularly applicable to the practice that sometimes exists of writing on the document the name(s) of the person(s) in the office to whom it is to be routed; separate routing slips should be used for this purpose.

11870–11872 OFFICIAL REPORTING SERVICE

11870 Official Reporting Service

11870.1 General

Contracts, based on competitive bids, are awarded annually for reporting the Agency's hearings. Regional Directors and officers-in-charge are notified in advance of the beginning of the fiscal year as to the selected contractor for the coming year and the rates and fees stipulated under the contract. The contractor notifies our field offices of its designated local subcontractor or agent for reporting service in each Region.

11870.2 Notification of Hearing Schedule

Notification of all hearing schedules must be sent to both the contractor and the local subcontractor. It is highly important that this information be issued promptly and accurately in every case. *See current contract for time limitations for notification of hearing schedules.*

11870.3 Coordination with the Local Reporter

Continuous coordination with the local reporter should be effected so that the number and location of hearings, either originally scheduled or rescheduled, are within the limitations of available reporters.

11870.4 Scheduling Hearings

Hearings should be scheduled in the Regional or Subregional Office city in every possible instance as this usually results in better delivery time of the transcript, savings in staff time and travel expense, and, under some contracts, a lower reporting rate.

11870.5 Timely Notification of Cancellations or Postponements

Notification of all hearings canceled or postponed must be sent to both the contractor and the local subcontractor. Telephone or telegraph notifications are sometimes necessary in order to avoid payment of a fee for a hearing that has been canceled or postponed.

Fees for hearings canceled or postponed without sufficient notice to the reporter constitute a heavy expense. All members of the staff must be alert to the problem of reporter's fees for cancellations that usually occur as a result of consent election agreements. Accordingly, sufficiently in advance of a date scheduled for hearing, every effort should have been made to ascertain if the hearing will proceed or if an agreement can be reached without assembling for the hearing. Many cancellation fees can be avoided by immediate notice to the reporter when the response indicates that no hearing will be held.

See the current contract for time limitations for notification of cancellations or postponements.

11870.6 Cancellations or Postponements at the Hearing Site

The official reporter supplies its local subcontractors with a form for endorsement by the hearing officer or field attorney when the reporter is present at the place of a canceled or postponed hearing. This form is the basis for billing by the reporter for the fee for canceled or postponed hearings and in most cases eliminates the necessity for further correspondence on the subject. This fee is not payable when a postponement, recess, or adjournment is ordered during the progress of the hearing. During settlement or consent negotiations at the place of scheduled hearing, the reporter should be released as soon as indications are clear that the hearing is to be canceled or postponed.

11870.7 Sales of Copies of Transcript

Pub. L. 92-463 requires that Federal agencies make copies of transcripts of hearings available to interested persons at actual cost of duplication. Copies of transcripts of hearings so ordered shall be provided by the contractor. Care must be exercised with respect to the use of Regional Office copies of the transcript by the parties. The transcript is part of the formal file, and as such is accessible to the public. The use of the transcript, however, should not be volunteered. When a request is received to read or hand copy the office copy, it should be made promptly available under such circumstances as will not delay Board personnel in processing the case. Loan of the transcript for use outside the office is not permitted.

11870.8 Complaints about Reporting Service

Complaints about reporting service should be transmitted to the Division of Administration, Facilities and Services Branch.

11870.9 Other Contract Provisions

Refer to the current reporting service contract for information relating to other provisions, such as:

a. Fees—attendance fees, cancellation fees (for cancellations and postponements), additional service fees

b. Delivery of transcripts and copies—ordinary copy, expedited copy, prompt copy, daily copy

c. Timely delivery of transcripts

d. Liquidated damages for delay in delivery of transcripts

e. Receipt and processing of transcripts and exhibits

f. Retention of stenographic notes and transcripts.

11872 Report of Obligated Cost of Hearing, Form NLRB-4237

It is the responsibility of the hearing officer in an R case and the trial attorney in a C case to complete this form immediately upon the close of the hearing or as of the last day of the month if the hearing continues into the subsequent month. Likewise, if the

hearing is postponed or canceled at the hearing site, this form must be completed by the respective hearing officer or trial attorney.

A hearing that is adjourned for 5 or more calendar days is considered a complete hearing for purposes of attendance fees. Therefore, in such situations, this form must be completed and turned in to the office manager immediately upon such adjournment and a new Form NLRB-4237 completed for the reopened hearing. If the hearing officer or trial attorney is away from the Regional Office on the last day of the month, he/she should telephone or telegraph the office to advise the estimated cost of hearing through that date.

11880–11882 INTRA-AGENCY COMMUNICATION

11880 Communication with Washington

If a direct communication is received by a Regional Office from another part of the Agency, on a matter that should properly be routed through the Division of Operations Management, answers addressed to the Associate General Counsel should be sent through the Division of Operations Management, along with copies of the original communication.

In submitting other than routine material to the Division of Operations Management such material should be identified.

Each of the Assistant General Counsels in the Division of Operations Management is the focal point of contact between Washington and the Regions assigned to the Assistant General Counsel. The Assistant General Counsel is the Region's representative on all matters relating to casehandling, performance, personnel, and administration. The Assistant General Counsel participates in Washington agendas involving regional cases and assists in handling matters or problems involving the Assistant General Counsel's Regions. Telephone calls should be made directly to the Assistant General Counsel.

All case correspondence to Washington office is sent over the Regional Director's signature.

11881 Communication with the Board

All communications that are sent directly to the Board should be addressed to the Office of the Executive Secretary.

11882 Communication Between Regional Offices

In the absence of Division of Operations Management clearance to the contrary, casehandling activities of Regional Office personnel should be confined to the geographical limits of their respective Regions. (With respect to travel to points outside of, but close to, the Region, the Regional Director is expected to exercise his/her discretion in the direction of getting the job done most efficiently and economically.)

Out-of-Region interviews will be conducted by personnel from the Region in which the interview is to be conducted, on request by the Regional Director to whose office the case is assigned. Such request (which should be sufficiently detailed to serve as a basis for the requested action without the necessity of extended correspondence) should be sent directly from Regional Director to Regional Director; and the requested materials—affidavits, reports, etc.—may be directly transmitted.

With respect to potential transfer of cases, initial communication between Regional Directors may be undertaken as outlined in section 11720.1.

Regional Directors are encouraged to negotiate directly with other Regions in the district or with contiguous Regions to obtain casehandling assistance and are authorized to issue travel orders to employees who are detailed to another Regional Office subject to the following guidelines.

a. Travel orders may be written for a period not to exceed 29 days. (Periods of 30 days or more require an SF-52 and must be processed through your Assistant General Counsel. See Administrative Manual, sec. 6022.3.)

b. All travel and *per diem* expenses must be charged to the Region receiving the assistance.

c. Travel orders are to be issued by the Regional Director who provides the Board agent.

d. An original and four copies of the travel order should be prepared. This will be a supplemental travel order to the employee's annual travel order. The travel order should set forth: the employee's name; the Region; the nature of the detail, including identification of case name and number, where appropriate; the estimated cost of the detail as determined by agreement between the Regional Directors; and, the Region to be charged.

e. The travel order and copies should be distributed as follows: the original to the traveler; one copy to the Executive Assistant to the General Counsel; one copy to the assisted Region; one copy to accompany the employee's travel voucher; and one copy to be retained by the issuing Regional Office.

f. In reporting its monthly travel and *per diem* costs, the releasing office will enter the employee's name under its list of travelers for the month on the *Report of Obligations* T1and show under "items Chargeable Elsewhere," the amount of the employee's monthly travel chargeable to the other Region and the Region to be charged.

Exceptions to this authorization would be any detail of 30 days or more, or any short-term detail that would produce abnormally high travel costs.

11884 COMMUNICATION; OTHER AGENCIES

11884 Liaison with Other Agencies

(For more specific guidance pertaining to OSHA matters, refer to G.C. Memos 75-29, 76-14, and 79-4. With respect to Mine Safety, see G.C. Memo 80-10. See also sec.

11751.3.) Normally, regional contacts with other agencies need not be cleared through the Division of Operations Management, except the requirement of clearance would continue when the potential violation concerns possible criminal conduct related to Board proceedings (e.g., fraudulent authorization cards, perjury, or obstruction of justice in connection with NLRB proceedings). Similarly, the clearance requirement would continue prior to referral if alleged unethical conduct of attorneys is involved. (See secs. 10054.3 and 11754.2(a).)

The Regional Office may directly contact local within-Region offices of other agencies in order to procure information (in connection with an actual case) that is available through such offices. For example, a Regional Office may request and secure such factual information from a local unemployment compensation office or mediation service office as the latter are authorized and willing to supply.

Regional Office personnel, within the limitations of Sections 102.117 and 102.118 of the Rules and Regulations (and secs. 11820–11828 herein), should cooperate in furnishing to local offices of other Government agencies such information as may be requested by them. Out-of-Region requests should be handled through the Division of Operations Management.

With respect to possible violations of other Federal statutes, see sec. 10054.3.

11886 CONGRESSIONAL INQUIRIES

11886.1 Reply by Regional Directors

Regional Directors have the authority to respond directly to members of Congress concerning inquiries about a status of a case or questions concerning the handling of a case. Courtesy copies of such letters are forwarded to the Division of Operations Management so that Washington might be fully apprised of all matters in which congressional interest has been expressed.

11886.2 Reply by Washington

Congressional inquiries concerning the following matters are referred to the Division of Operations Management for consideration and response:

a. Cases may be multiregional

b. Regional or general operations casehandling procedures

c. Cases pending in Washington on advice

d. Cases of national importance or widespread interest

e. The establishment of new Regional, Subregional, or Resident Offices

f. The relocation of regional boundaries

g. A change in the status of an existing office

h. Proposed legislation with respect to changes in our Act

i. Any congressional inquiries of such a nature that a reply should be more appropriately made by the General Counsel.